No. _____

In the
Supreme Court of the United States

HEATHER BAKER, Personal Representative of the Estate of Kyle Baker, Deceased,
Petitioner,

v.

CITY OF TRENTON, MI; MARK DRISCOLL; STEVE LYONS; AARON BINIARZ; STEVE ARNOCZKI,
Respondents.

On Petition for a 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

I.

1. Whether, consistent with the Second Amendment right to bear arms, police can conduct a warrantless search of a private home based on the resident's lawful purchase and possession of a firearm, in the absence of any indication that the gun was ever used illegally or offensively.

2. Whether Respondents' claimed belief that the decedent's mother was at risk of imminent injury, based on a police dispatch, satisfies the "objectively reasonable" requirement for a warrantless "risk of danger" entry of a private residence when the mother had not been in the home that day, nobody told the dispatcher that the mother was at the home, and the dispatcher did not tell the officers that the mother was at the home.

II.

3. Whether, in an excessive force case arising from a fatal police shooting, in which a defendant seeks summary judgment on grounds of self-defense, a disputed issue of material fact is presented when the plaintiff provides the official autopsy report which contradicts the defendant's story, but no expert report or testimony.

4. Whether, when a jury can reasonably find that retreat to safety was available, it is "excessive force" to instead kill a young man wielding a lawn mower blade, suspected of having stolen a cell phone and being mentally unbalanced.

PARTIES TO THE PROCEEDING

Petitioner Heather Baker is the mother of Kyle Baker, an eighteen year old high school student whose death is the subject of this lawsuit. She was appointed Personal Representative of Kyle's Estate by the Michigan Probate Court and is authorized by MCL 600.2922, Michigan's Wrongful Death Act, to pursue this action on behalf of Kyle's Estate.

Respondent City of Trenton is a Michigan municipal corporation located about 20 miles from Detroit. Respondent Mark Driscoll is a police officer employed by the City of Trenton who shot and killed Kyle Baker. Respondents Steve Lyons, Aaron Biniarz, and Steve Arnoczki are also police officers employed by the City of Trenton who joined Driscoll in entering Kyle Baker's home without a warrant.

STATEMENT OF RELATED PROCEEDINGS

- Baker v City of Trenton, et al., No. 18-2181 (6th Cir.) (Opinion issued and judgment entered August 29, 2019; mandate issued September 20, 2019).
- Baker v City of Trenton, et al., No. 2:16-cv-12280 (E.D. Mich.) (Opinion and Judgment entered September 24, 2018).

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

Heather Baker, Personal Representative of the Estate of Kyle Baker, Deceased, respectfully petitions 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

This Petition for Writ of Certiorari seeks review of the published Opinion of the United States Court of Appeals for the Sixth Circuit, 936 F3d 523 (6th Cir. 2019) (App., *infra*). That decision affirmed the summary judgment granted by the Untied States District Court for the Eastern District of Michigan. The District Court Opinion and Order (App. *infra*) is reported electronically as Baker v City of Trenton, 2018 U.S. Dist. LEXIS 22699; 2018 WL 9619323 (ED Mich, 2018).

JURISDICTION

This suit alleges that Respondents, acting under color of state law, denied Petitioner rights arising under the Constitution of the United States. The District Court had subject matter jurisdiction under 28 USC §1331 and 28 USC §1343.

After the District Court Opinion and Order granting summary judgment to all Defendants-Respondents, Petitioner filed a timely Notice of Appeal, invoking the jurisdiction conferred on the Court of Appeals by 28 USC §1291. Following briefing and oral argument, the Court of Appeals issued its published opinion of August 29, 2019.

Petitioner relies on the jurisdiction conferred on this Court by 28 USC §1254(1), "Cases in the court of appeals may be reviewed by the Supreme Court by... writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." This Petition, filed within 90 days of the Court of Appeals Judgment, is timely under this Court's Rule 13.1.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment:

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.

Fourteenth Amendment, §1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Overview

On May 28, 2015, eighteen year old Kyle Baker was shot and killed by Trenton, Michigan police officer Mark Driscoll at the home where Kyle stayed with his father, Tim Baker, and his stepmother.[1] Driscoll and three other Trenton police officers entered the home without a warrant in response to a report by Collin Matthieu, Kyle's best friend. Collin had expressed to the Trenton police dispatcher his concern for Kyle's mental well-being, noting that Kyle would not return Collin's cell phone.

Kyle's mother, Heather Baker, sometimes referred to as Ms. Baker, was appointed personal representative of her son's estate. She filed this suit under 42 USC §1983, alleging that Respondents, acting under color of state law, had infringed on Kyle's constitutional rights by the warrantless entry and use of excessive force.

The district court granted Respondents summary judgment under F. R. Civ. P. 56 ("no genuine dispute as to any material fact") (App. 26 - App. 75). The Court of Appeals for the Sixth Circuit affirmed, 936 F3d 523 (6th Cir. 2019) (App. 1 – App. 25). Even though Kyle's mother was at work in Detroit that afternoon; even though Collin told the dispatcher that Kyle was in contact with his mother by phone and did not say that

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[1] The home in question was actually owned by Kyle's step-mother. Kyle sometimes stayed there overnight. There is no dispute that Kyle's Fourth Amendment rights apply. United States v Washington, 573 F3d 279, 283 (6th Cir. 2009).

Kyle threatened his mother; even though Collin did not tell the dispatcher that Ms. Baker was present; even though the dispatcher did not say that Ms. Baker was at the house; and even though the officers saw and heard nothing to suggest that Ms. Baker was at the house, the unwarranted entry was held lawful because the officers "could have reasonably believed that Mr. Baker was inside with Kyle, that he was armed in some fashion, with the knife or the shotgun, or both, and that he was threatening her" (936 F3d at 531). In reaching this conclusion, the Court considered information that Kyle "possibly may have purchased a shotgun last week"[2] and that there was a knife in the house[3] as justification for the intrusion (936 F3d at 532).

The appellate court also upheld dismissal of the excessive force claim based on the account of Driscoll[4], first provided one month after the killing. He claimed that he shot Kyle firing upward with his right hand, from a prone position, with Kyle standing over him after Kyle struck the officer with a lawn mower blade. To refute this account, Plaintiff offered the autopsy

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[2] After Kyle died, his father learned that, on his 18th birthday, Kyle bought a shotgun to go hunting with his friend Herman. The shotgun was later found under the mattress of Kyle's bed, unused, with the receipt.

[3] The knife was a folding pocket knife with a 4 inch blade which Kyle had displayed to Collin with the blade unopened.

[4] The other three officers claimed not to have seen the shooting, and Kyle died from his wounds before he could explain his version of the events.

report showing that the trajectory of the bullet that took Kyle's life was travelling downward from Kyle's right to left (Driscoll's left to right), without the gun powder residue found in close range shootings.

Petitioner seeks a writ of certiorari to review these rulings.

Background Facts[5]

Kyle Baker ("Kyle") was a high school senior at Trenton High School, about five days away from graduation. Kyle turned 18 on May 2, 2015 and had been accepted at college. In addition to his studies, Kyle worked delivering pizzas and starting a landscaping company.

Kyle's parents, Heather Baker and Tim Baker, were divorced. Kyle was welcome at both parents' homes, typically spending weekdays at the home of his father and step-mother and weekends with his mother.

About one week before, Kyle began to act differently. He appeared fearful of others and distant, wanting to be alone. Kyle told his father that he had taken LSD on "senior skip day" and was apparently suffering the after effects.[6]

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[5] As the Court of Appeals correctly observed, for summary judgment purposes, disputed facts are viewed favorably to the non-movant (936 F3d at 526, fn. 1). This Statement of the Case recites the evidence in that light.

[6] Toxicology testing after Kyle's death revealed no traces of LSD, but traces of THC, the active chemical in marijuana. Fentanyl administered at the hospital after he was shot also showed up on toxicology testing.

On May 28, 2015, during fourth hour, Kyle was sent to the office of the principal, Dr. Doyle, because he was acting unusual. A police officer, Jake Davis, was summoned. As Dr. Doyle and officer Davis were talking, Kyle left school on his skateboard. No effort was made to detain Kyle. As Mr. Baker learned, "The police did a wellness check on him and they did not arrest him at that time". Driscoll was aware before the killing that officer Davis had been dispatched to the school for a student acting strange and had not arrested the student, but didn't know for sure that this was Kyle.

The Afternoon Of May 28, 2015

After fifth hour, Collin texted Kyle's mother, informing her of what happened. He also had a phone conversation with her.

That afternoon, Kyle's father, a local truck driver, and Ms. Baker, his mother, received phone calls from Dr. Doyle. Ms. Baker was called at her workplace in downtown Detroit. Dr. Doyle assured her that Kyle was not violent. An appointment was made for Kyle and his parents to meet with school authorities the next morning. When Mr. Baker learned what happened at school that day, he instructed Kyle, "when you get home you are to stay home".

That afternoon, Heather Baker called Kyle, from work, and he finally answered. Kyle said he didn't know why the police had been summoned to school. Kyle ended the conversation by telling his mother, "I love you". When Kyle didn't respond to a later call, Heather texted Collin expressing concern for her son.

After school, Collin looked for Kyle, first at Mr. Baker's house, then at a park Kyle frequented, then back at the Baker home. Collin entered and talked with Kyle who was alone in the basement, where Kyle and his friends usually met, as it had a pool table, television, and weightlifting equipment. Collin showed Kyle text messages from Heather expressing her concern, then called her and handed his cellphone to Kyle.

When Collin wanted the phone back, Kyle would not return it.[7] Kyle displayed a pocketknife, one of many that he collected, but did not open the four inch blade. Collin testified that he never heard Kyle threaten to hurt his mother, himself, or anyone else that afternoon. Kyle did not express any problem with his mother and was not angry with her. Throughout this time, Kyle's mother was not there; Kyle and Collin were the only ones in Kyle's home.

When he left, Collin went to the Trenton police station with two concerns: Kyle wouldn't give the phone back and Collin wanted the police to check on Kyle's well-being. In an unrecorded three minute interview, he spoke with Kelsey Pare, the dispatcher. According to the deposition testimony, Collin, "told her everything that happened" and Pare informed Respondents "exactly what I was told" by Collin. What was this?

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[7] Collin believes that Kyle retained the phone so Collin couldn't call the police. Kyle also may have wanted to keep it to review the text messages between his mother and Collin.

> "I told her that I went to his house because his mom called, and I was texting her and then gave him the phone when I went downstairs and seen him with the frying pan, I gave him the phone. He was talking to her on the phone. He was reading the texts, and that's when he wouldn't give me my phone back and that when I left because if I was - - when I was getting closer to him, he had the knife, so I didn't know if he was going to do anything. That when I left and went to the police station."

After providing this information, Collin remained at the station, available to provide further information, until after Kyle was shot. The officers were aware that Collin remained in the lobby.

Pare issued a dispatch that was responded to by four Trenton police officers: Respondents Driscoll, Arnoczki, Lyons, and Biniarz:

> "We have a teenage male in the lobby here, states that a teenager there named Kyle Baker left school today. When he went to go check on him he states that he had a knife in his home. He was threatening towards his mother. He also stole his cell phone. He left after he pulled the knife out. As far as he knows he's still at the residence. We also have word he possibly may have purchased a shotgun last week. Try and make contact on the house phone but its just going busy."

As the officers separately drove to Kyle's house, Pare spoke with them on the police radio. The relevant pre-shooting information was:

> "Caller came into station to report that he went to check on a friend that had left school today and when he did, his friend (Kyle Christian Baker, 18 yo w m) was threatening and yelling at his mother. He tried to talk to him and pulled a knife out and took his cell phone. The sub[ject] then went upstairs"; 'The caller left after the subj[ect] went upstairs and came to the [station]'; 'Sgt. Cheplick made several attempts to contact the house phone, busy line [.] Attempted to make contact by cell as well. No answer.'"

The Warrantless Entry Into Kyle's Home

The officers did not contact Ms. Baker at work, like Doyle had done. They did not ask anything further from Collin, who sat on the bench at the police station. Nor did they ask the neighbor, who was standing next door, whether she heard or saw anything unusual. They did not ask permission from anyone to enter the house or attempt to obtain a search or arrest warrant. They did not see or hear anything noteworthy before they all entered the Baker home through the unlocked back door, after receiving no response to knocking on the door. Each was armed with a flashlight, gun, extra ammunition, taser or pepper spray, and two sets of handcuffs.

Officer Biniarz imagined he heard the dispatcher say that Kyle was holding his mother against her will with a knife, admitting "I didn't have any evidence that she was there". Pare never told the officers that Ms. Baker was at the home, and Driscoll agrees that Pare did not say one way or the other. Biniarz believed they could take Kyle into custody to get a petition for hospitalization. Driscoll also considered committing Kyle to a mental health facility involuntarily. However, Chief of Police Voss testified that Trenton police did not take people into custody for a welfare check, unless "they were guilty of or had committed a crime".

The other officers also claimed to believe that Ms. Baker was in the house and Kyle was threatening her with a knife. At the scene, however, they reassured Kyle that, "you're not in any trouble".

After the officers entered the house, but before Kyle was shot, Mr. Baker received a call from Officer Cheplick,[8] advising that officers were at his house. Cheplick asked where Kyle's mother was, and Mr. Baker informed him, "I don't know, but I would assume she's at work at the Michigan Conference of Teamsters in Detroit". For unknown reasons Respondents did not seek, and Cheplick did not provide, this information to the officers at the Baker house. As Mr. Baker was returning to his home from work, about 5 minutes away, Cheplick called a second time advising him to go to the hospital.

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[8] Cheplick knew that Pare had discussed the situation with Collin. He remained at the station and continued to follow from there.

At the Baker house, officers Lyons and Biniarz found nothing upstairs indicative of wrong-doing - - no person, no weapon, no blood, nothing to indicate Kyle's mother was in the house. They apparently did not call out to Mrs. Baker or contact officer Cheplick.

Arnoczki and Driscoll stationed themselves at the top of the stairs to the basement. At the bottom, holding a lawn mower blade, Kyle made it clear that they were not welcome. The officers would not leave. They asked Kyle where his mother was and he told them, truthfully, that he did not know. The officers would not leave unless Kyle spoke with them, even though Kyle told them he didn't want to talk.[9] Kyle's anger grew with the police presence.

At one point, Kyle invited the officers to come down to the basement. Kyle did not verbalize an intent to injure, but they refused. They insisted that he drop the lawnmower blade and come up the stairs.

Kyle then took about two steps up the stairs as requested, carrying the lawn mower blade. Lyons tasered Kyle with a taser having a 25 foot range. Kyle was temporarily stunned, stepped back down the stairs, and became angrier. Lyons and Biniarz each tasered Kyle again.

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[9] The Complaint alleges a Fifth Amendment violation when the officers stayed because Kyle declined to speak to them, but Petitioner did not pursue that claim.

With Kyle tasered three times, Driscoll started down the stairs, announcing, "I'm going down and just jump on him". Kyle stood up and started back up the stairs.

The other officers retreated to safety on the main floor, as suggested by Trenton General Order #29, §VII(c)(6). That section discusses the "Reactionary Gap", by which officers create a safety zone by "disengag[ing] to create distance" when the distance between the officer and suspect is six feet or more.

Officers Arnoczki, Lyons, and Biniarz claim that they did not see Driscoll shoot Kyle or Kyle strike Driscoll. When Lyons handcuffed Kyle after the shooting, the blade was nowhere in the immediate area.

The Shooting

Contrary to ordinary procedure requiring a prompt report, Driscoll waited over one month to provide his version of the shooting. That statement indicated that he had been cut by the lawnmower blade.

According to his testimony, Driscoll walked up the stairs backward, then he fell, with his legs partly on the top stair or landing and partly on the kitchen floor. Kyle was seven feet away, and Driscoll fired upward with his right hand.

The Aftermath

Driscoll was treated for a hand wound, while Kyle was taken by ambulance to the hospital, where doctors unsuccessfully tried to save his life. The autopsy report

found no gunpowder stippling (the residue found with close quarters shooting). The trajectory of the shot was downward, and from Kyle's right to left.

A Michigan State Police investigation exonerated Driscoll from criminal liability. The investigating officer, Sgt. White, had already declared it as "self-defense" two hours after the shooting, without talking to the officers.

The Complaint

Petitioner filed suit on June 21, 2016. Invoking 42 USC §1983, she claims that Trenton and its officers, acting under color of state law, violated Kyle's constitutional rights. The suit alleges that the officers violated the Fourth Amendment and Fourteenth Amendment by conducting a warrantless intrusion into Kyle's home and that Driscoll used excessive force in killing Kyle instead of leaving the home as requested or safely disengaging.[10]

The Rulings Below

On September 24, 2018, Hon Marianne Battani, United States District Court Judge for the Eastern District of Michigan, issued her Opinion and Order granting Defendants' Motion for Summary Judgment

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[10] The Complaint included a claim of municipal liability which the lower courts dismissed on the basis that there was no constitutional violation by Trenton's employees. As that rationale depends on unconstitutional conduct by the individuals, it is not addressed separately. Likewise, since the appellate court did not decide whether qualified immunity applied, this Petition focuses on the issues decided by the Court of Appeals.

App. 26 – App. 75). The Court concluded that the facts known to the officers "gave rise to an objectively reasonable belief that someone in the Baker's home was in need of immediate aid or faced imminent injury" (App. 42), justifying a warrantless entry under the "community caretaker" exception to the warrant requirement, believing that "Defendant officers here relied on the first-hand account of Kyle Baker's friend, Collin Mathieu" (App. 45), "Defendant police officers acted on the basis of an eyewitness account" (App. 55).

The district court also granted summary judgment on the excessive force claim. In her view, Driscoll's account was to be accepted because the autopsy report - - - inconsistent trajectory and direction of the bullet and lack of gunpowder residue - - - as well as Driscoll's claim to have been struck with the lawn mower blade from seven feet away, were not to be considered because "these claimed inconsistencies are not supported by the report or testimony of an expert in ballistics or crime scene reconstruction" (App. 63).

The Court of Appeals did not adopt the district court's "community caretaker" justification for the entry. Instead, the Court focused on a "risk of danger to the police or others" exception to the Fourth Amendment's warrant and probable cause requirements (936 F3d at 530-531):

> "Under the exigent circumstances exception concerning the threat of violence to officers or others, police officers 'may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.'" Goodwin v. City of

Painesville, 781 F.3d 314, 332 (6th Cir. 2015) (quoting Schreiber v. Moe, 596 F.3d 323, 329–30 (6th Cir. 2010)). We use an objective test to analyze the circumstances that gave rise to a warrantless entry: 'An action is "reasonable" under the Fourth Amendment, regardless of the individual officer's state of mind, "as long as the circumstances, viewed objectively, justify [the] action."' Brigham City v. Stuart, 547 U.S. 398, 404 (2006) (quoting Scott v. United States, 436 U.S. 128, 138 (1978)). As applied to the danger-to-police-or-others exception, a lawful warrantless entry requires 'an objectively reasonable basis for believing . . . that a person within the house is in need of immediate aid.' Goodwin, 781 F.3d at 332 (quoting Michigan v. Fisher, 558 U.S. 45, 47 (2009)). More specifically, this standard requires us to determine whether 'a reasonable person [would] believe that the entry was necessary to prevent physical harm to the officers or other persons.' Brigham City, 547 U.S. at 402 (citation omitted) (alteration in original)."

Applying this analysis, the Court upheld the entry:

"Based on [the information provided by the dispatcher], they could have reasonably believed that Ms. Baker was inside with Kyle, that he was armed in some fashion, with the knife or shotgun, or both, and that he was threatening her".

On the excessive force claim, the Court of Appeals analysis tracked that of the district court. It concluded that all reasonable jurors would be impelled to conclude that it was not "excessive force" for Driscoll to kill Kyle.

REASONS FOR GRANTING THE PETITION

I. PETITIONER'S CHALLENGE TO THE WARRNTLESS ENTRY OF A PRIVATE HOME PRESENTS SIGNIFICANT ISSUES WHETHER, CONSISTENT WITH THE SECOND AMENDMENT RIGHT TO BEAR ARMS, THE OWNERSHIP OR PURCHASE OF A FIREARM CONSTITUTES JUSTIFICATION FOR A WARRANTLESS SEARCH, AND REGARDING WHAT MISINFORMATION CONSTITUTES "OBJECTIVELY REASONABLE" GROUNDS FOR BELIEVING THAT SOMEONE IN THE HOUSE IS AT RISK FOR IMMINENT PHYSICAL INJURY

A. The Warrantless Invasion Of Kyle's Home Implicates The Most Fundamental Protections Of The Fourth Amendment

When the four armed police officers barged through the door, Kyle was at home, as his father directed, to avoid interaction with others in his confused state of mind. He had committed no crime more heinous than taking LSD a week or so before, then retaining his friend's cell phone while displaying the unbladed body of a pocket knife. "At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable

governmental intrusion", Silverman v United States, 365 US 505, 511 (1961).

It is one of the most raw exercises of governmental power over its subjects to invade a private home, uninvited. It is as much an affront to the dignity and privacy of a citizen today, as it was when the British took over the homes of the Founding Fathers and their compatriots. It is with good and enduring reason that the Fourth Amendment, with its "warrant" and "probable cause" requirements, strictly curtails hostile entry into a private residence. As this Court emphasized in Payton v New York, 445 US 573, 585-586 (1980), "physical entry of the home is the chief evil against which the Fourth Amendment is directed". This case strikes at the very heart of the Fourth Amendment.

B. The Officers' Claimed Belief That Kyle Was Holding His Mother Hostage And Threatening Her Safety With A Weapon Has No Basis In Fact

The district court below found the warrantless entry justified by "The Facts Known To The Police Officers" (App. 39). There were no "facts" at all "known" to the officers when they arrived at the Baker home. They had no first-hand knowledge of the "facts". The actual "facts" were that:

- At school that day, Kyle was observed to be disoriented and withdrawn.
- As the principal stated before the police arrival, Kyle was not violent in that condition.

- The Trenton police officer who observed Kyle at school did not think it appropriate or necessary to detain Kyle.
- Ms. Baker was at work in Detroit, where she had been called by Dr. Doyle and from where she communicated with Kyle.
- The communication between Ms. Baker and Kyle or Collin was all by telephone.
- Ms. Baker was never at her ex-husband's home that day.
- Collin's testimony is inconsistent about whether Kyle's statements to his mother were "threatening", but at most any threats were verbal and made outside her presence.
- The knife that Kyle showed Collin had a four-inch blade that was folded and the body had been displayed to deter Collin from trying to retrieve the phone; the blade was not opened and no effort was made to use it as a weapon.
- Apart from the loss of his phone, Collin expressed to the dispatcher his concern that Kyle was disoriented and not thinking straight, possibly as an after effect of a hallucinogen taken days before; he did not express concern for Heather Baker's physical well-being.
- Collin believed that Kyle may have (legally) purchased a shotgun, but nothing suggested that it had ever been used to shoot game or to threaten anyone.

C. This Case Illustrates The Role of Magistrates In Determining Whether Entry is Justified

With no basis in fact for the entry, the lower courts excused Respondents' conduct because they didn't know the actual facts and did not make the effort to take the simple steps that would clarify any doubt, such as talking to Collin, who remained at the police station, or asking Pare to do so, or calling Heather at work, as Dr. Doyle had. In Hopkins v Bonvicino, 573 F3d 752, 765 (9th Cir.), the Court observed, "If police officers otherwise lack reasonable grounds to believe there is an emergency, they must take additional steps to determine whether there is an emergency that justifies entry in the first place". Petitioner accepts the principle that the constitutionality of an entry is judged by the information available to the officer, and that there is no constitutional duty to investigate before taking action. But one may fairly question the decisions below which authorize intrusions based on ignorance and the unwillingness to make readily available efforts to find out the actual facts - - - a sort of "shoot first and ask questions later" approach to the Fourth Amendment. The danger with police officers arrogating to themselves the role of deciding whether they can enter another's home uninvited was identified by this Court in Johnson v United States, 333 US 10, 13-14 (1948):

> "The point of the Fourth Amendment which often is not grasped by zealous officers is not that it denies law enforcement the support of the usual inferences which reasonable men draw

> from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate, instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

It is for these reasons that searches and seizures inside a home without a warrant are presumptively unreasonable. Payton; Groh v Ramirez, 540 US 551, 564 (2004). This case presents the Court with the opportunity to reaffirm protections provided by the Fourth Amendment, as historically construed, and to clarify what is required to overcome the presumption.

D. The Two Concerns Expressed To The Police By Collin - - - the Retention of His Cell Phone And Kyle's Mental Well-Being - - - Do Not Justify The Warrantless Intrusion; The Outcome Hinges on the "Risk of Danger" "Exigent Circumstances"

One of Collin's concerns was that Kyle had his cell phone and he wanted it back. This was a subject of both dispatch notifications, "He also stole his cell phone", "took his cell phone". As an attempt to recover the phone, or investigate the reported theft, or arrest Kyle for having taken the phone, the intrusion is plainly violative of the Fourth Amendment. Even with probable cause, a warrantless search or arrest for a minor offense is unlawful in the absence of an emergency. United States v Karo, 468 US 705, 715 (1984); Welsh v Wisconsin, 466 US 740 (1984).

The second concern expressed by Collin was Kyle's mental stability, a theme seized by Respondents who entered the house with a view toward taking Kyle into custody for involuntary mental health treatment, the so-called "community caretaker" function relied on by the District Court. That doctrine has evolved through cases such as Cady v Dombrowski, 413 US 433, 441 (1973) (search of vehicle, left behind by police officer, to retrieve a firearm); Michigan v Tyler, 436 US 499 (1978) (firefighters entering a burning building to put out the fire and investigate its origin); and Brigham City Utah v Stuart, 547 US 398 (2006) (police entering home during 3:00 a.m. brawl after seeing blows struck). This rationale looks to whether the police were executing a community service program ["an inquiry into programmatic purpose", Brigham City, 547 US at 405]. This "community caretaker" analysis "is in no sense an open-ended grant of discretion that will justify a warrantless search whenever an officer can point to some interest unrelated to the detection of crime". Hunsberger v Wood, 570 F3d 546, 554 (4th Cir. 2009).

Even if the police had known of Kyle's suspected use of hallucinogens or disorientation at school - - and the dispatches do not mention either - - this would not justify the intrusion. Under Michigan's Mental Health Code, individuals can only be taken into custody for involuntary mental health treatment by compliance with statutory procedures, MCL 330.1403. See also Ex Parte Martin, 248 Mich 512, 515; 227 NW 754 (1929); M. Civ. J. I. 171.02.

And, "involuntary mental health treatment" is defined as "court-ordered hospitalization...". The law does not permit police officers to take people into involuntary custody without a warrant or court order. As Chief of Police Voss acknowledged, it is not the program in Trenton to take people into custody for suspected hallucinations and the like.

Even with lawful process, only a "person requiring treatment" may be subjected to involuntary seizure. That term is defined in MCL 330.1401(1)(a):

> "An individual who has mental illness, and who as a result of that mental illness can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure himself, herself, or another individual, and who has engaged in an act or acts or made significant threats that are substantially supportive of the expectation."

Kyle had no "mental illness" at all, only temporary drug-induced disorientation. He could not "reasonably be expected within the near future to... seriously physically injure himself... or another individual". He hurt no one before the police invaded his home, and the school principal confirmed he was not violent. He did nothing "substantially supportive" of any expectancy of imminent violence. The claimed "community caretaker" justification for entering the home for Kyle's psychological "well-being" is untenable. Certiorari should be granted to make it clear that the Fourth Amendment does not permit warrantless intrusions to take into custody a suspect displaying signs of mental

disturbance or the influence of drugs in the absence of imminent danger of injury.

E. The "Risk of Danger" "Exigent Circumstances"

Thus, the only "exigent circumstances" potentially applicable are "a risk of danger to the police or others" if an immediate entry is not made. The Court below expressed what was required to trigger this exception to the warrant requirement and overcome the presumption that the warrantless entry violated the Fourth Amendment (936 F3d at 530-531):

> "Exigent circumstances are situations where real[,] immediate[,] and serious consequences will certainly occur if the police officer postpones action to obtain a warrant." Thacker v. City of Columbus, 328 F.3d 244, 253 (6th Cir. 2003) (internal quotation marks and citations omitted)."
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> "Under the exigent circumstances exception concerning the threat of violence to officers or others, police officers 'may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.'" Goodwin v. City of Painesville, 781 F.3d 314, 332 (6th Cir. 2015) (quoting Schreiber v. Moe, 596 F.3d 323, 329–30 (6th Cir. 2010)). We use an objective test to analyze the circumstances that gave rise to a warrantless entry: 'An action is "reasonable" under the Fourth Amendment, regardless of the

> individual officer's state of mind, "as long as the circumstances, viewed objectively, justify [the] action.'" Brigham City v. Stuart, 547 U.S. 398, 404 (2006) (quoting Scott v. United States, 436 U.S. 128, 138 (1978)). As applied to the danger-to-police-or-others exception, a lawful warrantless entry requires 'an objectively reasonable basis for believing . . . that a person within the house is in need of immediate aid.' Goodwin, 781 F.3d at 332 (quoting Michigan v. Fisher, 558 U.S. 45, 47 (2009)). More specifically, this standard requires us to determine whether 'a reasonable person [would] believe that the entry was necessary to prevent physical harm to the officers or other persons.' Brigham City, 547 U.S. at 402 (citation omitted) (alteration in original)."

Kyle posed no "risk of danger to the police" while alone in the house. Any "risk of danger" arose because of the entry, not as a reason why entry was required. "Although exigent circumstances may justify entry, police may not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment." Osborne v Harris County, 97 F Supp 3d 911, 927 (Tex Dist Ct, 2015); Kentucky v King, 563 US 452 (2011).

Respondents argued, and the Court of Appeals agreed, that, the circumstances, "viewed objectively" gave rise to "an objectively reasonable basis for believing that [Heather Baker] [was] in need of immediate aid", so "the entry was necessary to prevent physical harm to [her]". In the view of the Court of

Appeals, the information known to the police when they arrived at the Baker home "objectively" supported the belief, "that Ms. Baker was inside with Kyle, that he was armed in some fashion, with the knife or the shotgun, or both, and that he was threatening her" (936 F3d at 531).[11] These three components, "armed", "Ms. Baker... inside", and "threatening", were what the Court of Appeals deemed objective evidence that Kyle's mother was in the home and that "real, immediate and serious consequences [would] certainly occur" without immediate entry.

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[11] The Court also addressed what the officers learned at the scene - - - that the phone line was busy and no one answered the door - - - as not "dispel[l]ing them of the notion that Ms. Baker was inside" (936 F3d at 532). The Court said nothing about other observations at the home, such as the neighbor who mentioned nothing abnormal, no screams or calls for help, no signs of blood, no indication of Ms. Baker's car, no signs of struggle, and Kyle's forthright statement that he didn't know where his mother was.

In all events, a busy phone line and declining to answer the door to several police officers is hardly indicative that Heather Baker was in danger of physical violence. Consider the constitutional implications of that analysis: "Let us in, or your failure to do so allows us to break the door down". See Osborne v Harris County, 97 F Supp 3d 911, 927 (Tex. Dist. Ct., 2015); Grove v Wallace, 2016 U.S. Dist. LEXIS 174857 (WD Mich, 2016).

F. Certiorari Should Be Granted To Consider Whether, Consistent With The Second Amendment, Information That The Decedent "Possibly May Have Purchased A Shotgun" Justifies A Warrantless Intrusion Into A Home Where The Shotgun Was Never Used, And Was Never Claimed To Have Been Used

A major factor in the outcome reached by the lower courts was the dispatcher's statement that, "We also have word he possibly may have purchased a shotgun last week". The shotgun remained, unused, under the mattress of Kyle's bed. Collin never indicated that it had ever been used at all. The dispatcher said nothing about use of a shotgun, only that "he possibly may have purchased" it. The lower court's characterization of "possibly may have purchased" as meaning that Kyle was "armed" was central to the finding that Heather Baker (if she had been present) was at risk of "imminent injury" or "in need of immediate aid" making entry "necessary to prevent physical harm".

The "possibly may have" standard is no standard at all. In common parlance, "anything is possible". "Possibly may have" is incapable of objective verification or refutation, proof or disproof. The replacement of familiar Fourth Amendment standards like "probable cause" and "reasonable suspicion" with "possibly may have" is alarming. It would be appropriate to grant review to determine whether the Fourth Amendment permits home invasions on the basis of "possibly may have".

Nor does mere purchase of a weapon indicate an imminent risk of injury to another. Otherwise, every lawful gun owner in the United States[12] would be subject to warrantless government searches. In view of District of Columbia v Heller, 554 US 570 (2008), Fourth Amendment protections are not forfeited by exercising rights guaranteed by the Second Amendment. As several Courts of Appeals have held, in applying "knock and announce" laws, mere ownership of a gun does not give rise to exigent circumstances. US v Marts, 986 F2d 1216, 1218 (8th Cir. 1993); U.S. v Moore, 91 F3d 96, 98 (10th Cir. 1996); Gould v Davis, 165 F3d 265, 271 (4th Cir 1998).

Under the approach applied below, lawful ownership of a firearm exposes gun owners to an "exigent circumstances" search that those who do not exercise Second Amendment rights would be spared. This Court should grant certiorari to review the decision below which permits dilution of Fourth Amendment rights as a consequence of exercising Second Amendment rights.

The lower court's reliance on Kyle's ownership of a knife as a basis for warrantless entry is not itself constitutional in nature, but draws in question the "imminent risk of danger" analysis. The information known to the officers was only that Kyle owned a knife which had been shown to Collin. There is no information at all that Kyle possessed the knife in Heather's presence, or that the blade had been

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[12] According to Wikipedia, 393,000,000 firearms are owned by United States civilians.

unfolded to Collin (who was then safely sitting at the police station to answer any questions the officers might have).

One may safely assume that virtually every kitchen in America contains a knife with an exposed blade. Of the estimated 393,000,000 firearms owned by Americans, at least 350,000,000 must be owned by persons who also own a knife. The sheer number of people who would be subject to warrantless entry on the basis of simultaneously owning both a gun and a knife demonstrates how mere ownership of a gun, knife, or both falls far short of satisfying the highly individualized inquiry needed to justify a presumptively unlawful warrantless entry into a private residence.

Without ownership of an unused shotgun and knife in the mix, Respondents' argument rests on the proposition that they had objective reason to believe that Heather Baker was in the home, and that Kyle had threatened her in some unspecified way, such that, "real, immediate, and serious consequences [would] certainly occur" (936 F3d 530) if the four officers did not storm the Baker home.

G. Respondents' Assumption That Heather Baker Was In The House And In Danger of Physical Harm Was False And Was Not Based On Objective Facts

The "risk of danger" justification requires an "objectively reasonable" basis. Brigham City, 547 US at 400. A hunch or mere possibility that an occupant needs immediate aid cannot justify warrantless entry.

Gradisher v City of Akron, 794 F. 3d 574, 584 (6th Cir. 2015), quoting Nelms v Wellington Way Apartments, LLC, 513 F. App'x 541, 545 (6th Cir. 2013).

Respondents' claimed belief that Ms. Baker was in danger is belied by Ms. Pare's testimony that she informed Respondents "exactly what I was told" by Collin. Collin agreed that, "I told her everything that happened".

The objective facts do not show "certai[n]" "real, immediate, and serious consequences" were befalling Ms. Baker. Those objective facts do not indicate that Ms. Baker was at risk of imminent harm. Kyle never threatened his mother at all. He told Ms. Pare, who claims that she conveyed his information accurately to the police, that Kyle spoke with his mother by telephone and that she was not at the house. No one with personal knowledge claimed that Ms. Baker was at her ex-husband's home, or that Kyle ever threatened her with physical harm. Ms. Pare never told Respondents that Heather Baker was at the home.

The courts below discounted the testimony of Ms. Pare that she told Respondents "exactly what I was told" and considered only the content of the dispatch communications. Even focusing exclusively on the dispatches, there was nothing that gave rise to an "objectively reasonable" belief that Kyle's mother was in imminent danger of physical harm. The only excerpt in those communications mentioning Kyle's mother was that, "He was threatening toward his mother" (followed by reference to the cell phone) and "he was threatening and yelling at his mother" (again followed by reference to the cell phone). There was no

statement regarding Heather's whereabouts, nor was there any indication of threatening behavior beyond "yelling". The "objective" information, even if it had been true, indicated only that Kyle "yell[ed]" at his mother, in some fashion that Collin regarded as "threatening" in some unspecified way. Reduced to its essence, the decision below permits a warrantless intrusion by multiple armed police on the basis of a second hand report that someone yelled at another (at a distant location, over the phone) in a way that someone regarded as "threatening". This Court should review a ruling that permits such an easy end run around the Fourth Amendment and its core protection of those in their home.

The facts of individual cases of course vary, but the broad view of "objectively reasonable" taken by the Sixth Circuit is far more lax than that taken by other courts. Recent decisions which more zealously protect Fourth Amendment values include United States v Delgado, 701 F3d 1161 (7th Cir. 2012) (warrantless entry to search for a possible inhabitant is unconstitutional in the absence of evidence of any wrongdoer or victim inside and where there were no signs of struggle upon arrival before entry); McInerney v King, 791 F3d 1224 (10th Cir. 2015) (where the occupant had a history of drug and alcohol abuse, and a history of violence toward her ex-husband's current romantic interest, and there were guns in the house, this does not provide "objectively reasonable" grounds for believing that her child was in immediate danger; warrantless entry held unconstitutional); United States v Brown, 230 F Supp 3d 513, 525 (MD La, 2017) (warrantless entry to look for someone inside held

unlawful); United States v Calhoun, 236 F Supp 2d 537, 548 (DC Conn, 2017) (search to see if anyone might be present and in danger is not justified; "the officers' objectively reasonable belief must be based on something more than speculation"); People v Ovieda, 7 Cal 5th 1034, 1043 (Cal Supreme Court, 2019) (protective sweep to see if anyone was in the house in need of aid violates the Fourth Amendment). United States v Washington; Osborne; Sanchez v Gomez, 2017 U.S. Dist. LEXIS 141981 (WD Tex. 2017). The disparate views should be reconciled by this Court.

II. THE COURT OF APPEALS DECISION THAT IT WAS NOT "EXCESSIVE FORCE" FOR RESPONDENT DRISCOLL TO KILL KYLE BAKER SHOULD BE REVIEWED

A. Overview

The Fourth Amendment prohibits the use of excessive force against citizens. Tennessee v Garner, 471 U.S. 1 (1985); Graham v Connor, 490 U.S. 386 (1989).

The dimensions of the protection were explained in Graham, 490 U.S. at 396-397:

> "As in other Fourth Amendment contexts, however, the reasonableness inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."

The question of "objectively reasonable" depends on the unique facts and circumstances confronting the officer. This is necessarily so, as the calculus requires balancing the nature and quality of the intrusion on Fourth Amendment interests against the countervailing governmental interests (Graham, 490 U.S. at 396). As the Graham Court observed (490 U.S. at 396):

> "[T]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, Bell v. Wolfish, 441 U.S. 520, 559, 60 L.Ed.2d 447, 99 S. Ct. 1861 (1979), however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."

Taking human life is the most grave exercise of power that government can wield over a citizen. Practically speaking, the use of lethal force is only justified when necessary to avoid death or injury to others.

B. Certiorari Should Be Granted to Consider Whether Summary Judgment is Warranted in an Excessive Force Case Where the Defendant's Claim of Self-Defense is Refuted by Scientific Objective Circumstantial Evidence

As in many instances of dead suspects, the officer inflicting the lethal wounds was the only eyewitness. The other officers claimed not to have seen the shooting, so the only person to support the "self-defense" notion is Driscoll, whose fatal shooting silenced Kyle's side of the story. Driscoll waited over one month before giving his explanation, a fact to which the lower courts attached no significance.

With this delay, Driscoll could await the reports of the other three officers before committing to his own version of events. He could draft his own account to make sure that his story comported with theirs. The fact that Driscoll waited one month before committing to his version fairly draws in question his memory and the opportunity to falsify.

It is in this context that the autopsy report, an objective recitation of scientific fact, assumes such importance. In this case, the medical examiner's examination refuted the account of Respondent in many critical particulars. As one major example, Driscoll claimed that Kyle struck him with the lawnmower blade, and that this was the reason for the shooting. Yet, by Driscoll's own testimony, Kyle was seven feet away at the time of the shooting. The blade was considerably shorter than that. It was physically impossible for Kyle to have struck Driscoll with the

blade from seven feet away. And, the absence of gunpowder residue confirms that this was not a close range shooting as Driscoll claimed.

The trajectory of the bullet also disproves Driscoll's version. While the district court scoffed at this evidence, it scarcely takes a ballistics expert to realize that a shot fired upward, as Driscoll claimed, cannot reverse direction midflight to strike the target at a downward trajectory. Nor can a bullet fired from right to left enter the decedent's body from the opposite direction. In short, the scientific evidence proves that the fatal shot was fired by Driscoll from above Kyle at such a distance that Driscoll could avoid lethal force by disengaging, as the other Respondents had.

As has often been noted, the general principles of Rule 56(c) jurisprudence, viewing the facts and reasonable inferences favorably to the non-movant, apply to the "excessive force" issues of this case. As the Court explained in Adams v Metiva, 81 F3d 375, 387 (6th Cir. 1994), "It is the province of the jury, not the court, to decide on the credibility of the defendant's account of the need for force". Accord: Smith v Township of Hemet, 394 F3d 689, 701 (9th Cir. 2005); Groman v Township of Manalapan, 47 F3d 628, 634 (3rd Cir. 1995). The fact that a police officer's "self-defense" account is refuted by scientific evidence gives rise to a disputed issue of fact, Brandenburg v Cureton, 882 F2d 211, 215 (6th Cir. 1989).

The failure to consider the autopsy report conflicts with that body of law. And, is crucial to the outcome. If, as the autopsy reflects, Driscoll shot downward at Kyle from so far away as to leave no stippling, then

reasonable jurors can conclude that he could readily withdraw without taking Kyle's life.

Courts have held under comparable facts that it is unconstitutional to kill someone when the surrounding facts do not reflect an immediate threat of serious harm. Brandenburg; Dickerson v McClellan, 101 F3d 1151, 1163-1164 (6th Cir. 1996); Smith v Cupp, 430 F3d 766, 775 (6th Cir. 2005); Sample v Bailey, 409 F3d 689, 699 (6th Cir. 2005); Groman.

The courts below placed great reliance on Chappell v City of Cleveland, 583 F3d 901 (6th Cir. 2009). There, the prime suspect in an armed robbery investigation admitted to committing several armed robberies previously (585 F3d at 904) - - not a suspected cell phone thief or LSD experimenter. Unlike here, the officers in Chappell obtained a warrant (Id.). While executing the warrant, the officers faced the suspected robber who pulled a knife and advanced to about six feet away (585 F3d at 910). Significantly, "Both detectives were backed up against a wall in the small bedroom and there was no ready means of retreat or escape" (585 F3d at 911). Here, in sharp contrast, Driscoll could have readily withdrawn, just as the other officers had.

These very distinctions were the focus of Bletz v Gribble, 641 F3d 743, 753 (6th Cir. 2011). There, the officer shot and killed a man in his own home when the decedent pointed a gun at the officer and did not promptly comply with orders to drop the weapon. This Court upheld denial of summary judgment, rejecting reliance on Chappell:

> "Here, there was no imputation of past or potential future violence on the part of Fred. In Chappell, the officers were in a small room with no opportunity to retreat. Here, the officers were in a breezeway, only feet away from the outside and, arguably, safety. In Chappell, the subject had advanced to within five to seven feet and was apparently lunging forward with a knife. Here, Fred was fifteen feet away and was allegedly lowering his weapon.
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> Most importantly, in Chappell, "[n]one of [the] facts [were] refuted by physical or circumstantial evidence and none [were] disputed by contrary testimony."

Another similar case is Scozzari v City of Clare, 723 F Supp 2d 945 (ED Mich, 2010), affirmed, Scozzari v Miedzianowski, 454 Fed Appx 455 (6th Cir. 2012), where the police shot a mentally ill man who had committed no known crime, used the same vulgarity as Kyle in refusing an officer's request to drop his gun, and retreated into his own home (723 F Supp 2d at 953). In entering the home, the police claimed to be concerned that someone inside could be in danger - - - the same speculation offered by Respondents in this case. When decedent failed to drop a knife or hatchet and was advancing at the officer who claimed to have fallen (sound familiar?), the officer killed him. Ultimately, the Court upheld denial of summary judgment, rejecting the Defendant's reliance on Chappell (454 Fed. Appx. at 463).

Another comparable case is Maddox v City of Standpoint, 2017 U.S. Dist. LEXIS 161596 (DC Idaho, 2017). In that case, which did not involve the sanctity of a home, the police received a report of a woman standing outside a hospital with a knife threatening people. When they approached, demanding that she drop the knife, she responded "F*** you" and continued to walk toward the officer. After tasering the suspect, two officers opened fire, killing the woman. After reviewing the factors at length and discussing Chappell, the Court rejected the officers' "qualified immunity" argument.

The Maddox Court observed:

> "'A simple statement by an officer that he fears for his safety or the safety of others is not enough, there must be objective facts to justify such concern.' *Deorle v Rutherford*, 272 F. 3d 1272, 1281 (9th Cir. 2001)."

The ruling below conflicts with this body of law on a subject as grave as the authority of government to take human life. That is sufficiently important as to warrant Supreme Court review.

CONCLUSION

WHEREFORE, Petitioner HEATHER BAKER, Personal Representative if the Estate of Kyle Baker, Deceased, prays that this Honorable Court grant her Petition for Writ of Certiorari.

Respectfully submitted,

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