No. 19-

IN THE

Supreme Court of the United States

SHERIFF DONALD E. CRAIG, SGT. TRAVIS PALMER CURRAN, A.K.A. TRAVIS LEE PALMER, DEP. FRANK GARY HOLLOWAY, DEP. KEELIE KERGER, DEP. BILL HIGDON, DEP TODD MUSGRAVE, *et. al.*,

Petitioners,

v.

JANET TURNER O'KELLEY, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN HARLEY TURNER, JOHN ALLEN TURNER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a panel decision decided nine days before the relevant conduct in question constitutes clearly established law to deprive government officers of qualified immunity. See D. C. v. Wesby, 138 S. Ct. 577, 591 (2018) ("We have not yet decided what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity.").

2. Whether timing constitutes an extraordinary circumstance as articulated by Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), such that a police officer may nonetheless be entitled to qualified immunity despite the law being clearly established nine days earlier.

3. Whether the Eleventh Circuit erred in holding that a general principal of law announced in Moore v. Pederson, 806 F.3d 1036 (11th Cir. 2015), firmly established with the requisite degree of particularity that the officers violated clearly established law in the particular circumstances they faced.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit were Petitioners Travis Palmer Curran, Frank Gary Holloway, Keelie Kerger, Bill Higdon, and Todd Musgrave.; Respondents Janet Turner O'Kelley and John Allen Turner; and Jonathan Salcedo and Rodney Curtis.

RELATED CASES

O'Kelley v. Craig, No. 2:17-CV-00215-RWS, U.S. District Court for the Northern District of Georgia. Judgment entered Sept. 27, 2018.

O'Kelley v. Craig, No. 18-14512, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered July 16, 2019.

TABLE OF CONTENTS

Table of Contents

Page

Table of Contents

TABLE OF APPENDICES

Page

TABLE OF CITED AUTHORITIES

Page

Cases

Page

Page

Page

Page

Page

Statutes and Other Authorities

Page

INTRODUCTION

Harley Turner, an armed suspect who was reported threatening nearby raccoon hunters in the North Georgia mountains with bodily harm, died after a nighttime armed standoff with multiple law enforcement officers deteriorated into gunfire after Turner was hit with a nonlethal beanbag round.

Upon the officers' motion to dismiss, the district court granted them qualified immunity, holding in relevant part that clearly established law did not foreclose the officers from performing a Terry-like stop in these circumstances. Acknowledging an Eleventh Circuit panel decision, see Moore v. Pederson, 806 F.3d 1036 (11th Cir. 2015), handed down just nine days before the incident, the district court nonetheless found that it was too dissimilar and did not provide fair and clear warning for this tense and dangerous circumstance.

A panel of the Eleventh Circuit, however, reversed the district court. Relying exclusively on Moore, the panel concluded that no reasonable officer would have understood that a Terry-like stop would have been lawful in light of the Moore decision reached nine (9) days before the incident. A petition for rehearing *en banc* was denied.

Even assuming Moore provides the necessary factual and material similarity this Court requires, a panel decision handed down only nine days before the relevant conduct cannot constitute controlling authority clearly establishing the law for purposes of qualified immunity. The mandate in the Moore decision had not even issued, nor had the appeals process expired, before the Petitioners

were held to have violated the law that Moore supposedly had clearly established. This Court's intervention is necessary to resolve this important and open question of federal law, since only this Court can do so.

The panel's decision further deepens the chasm between the circuits that have addressed whether and to what extent the timing of a pertinent decision qualifies as an extraordinary circumstance under Harlow. And without clear guidance from this Court, law enforcement officers in the rural reaches of the country who are otherwise acting in good faith can now lose their qualified immunity simply as a result of the happenstance as to when the advance sheet of a pertinent decision is released. This Petition should be granted and the disarray in the Circuit Courts cleared away.

The final reason warranting this Court's intervention is that Moore does not even clearly establish the law under the circumstances the deputies faced. The panel's decision concluding otherwise clearly contravenes this Court's recent and repeated directives against framing clearly established law at a high level of generality. The district court understood those admonitions and faithfully applied this Court's precedents. But the Eleventh Circuit panel ignored them altogether.

OPINIONS BELOW

The decision of the U.S. Court of Appeals for the Eleventh Circuit reversing the district court's grant of the motion to dismiss is reported at 781 F. App'x 869 and reproduced in the Appendix at 1a. The district court's unreported decision granting the deputies

qualified immunity is available at 2018 WL 4636638 and reproduced in the Appendix at 24a. The Eleventh Circuit's unreported order denying the petition for rehearing or in the alternative rehearing en banc is reproduced in the Appendix at 47a.

JURISDICTION

The Eleventh Circuit issued its order denying the Deputies' petition for rehearing or in the alternative rehearing en banc on October 28, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. IV, provides:

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

42 U.S.C. § 1983 provides in relevant part:

> 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 . . .

STATEMENT OF THE CASE

A. Factual Background

On October 24, 2015, an individual called 911 and reported that he and some others who were hunting near Carver Mill Road in Pickens County, Georgia had been accused of trespassing and threatened with bodily harm. App.25. Pickens County deputy sheriffs then met the hunting party on Carver Mill Road and were lead to the O'Kelley residence, where Harley Turner, his mother, Janet O'Kelley, and his step-father, Stan O'Kelley, lived.

The deputies arrived outside the O'Kelley property around 9:00 p.m. that night and spoke with Mr. O'Kelley. The deputies were then informed by Mr. O'Kelley that it was his step-son, Harley Turner, who had threatened the hunters and that Turner was currently armed with a gun. App.26. So the deputies then sent Mr. O'Kelley to a neighbor's house.

Moments later, Harley Turner approached the deputies with flashlight in hand, agitated, shirtless, and armed with a pistol strapped across his chest. Refusing to put down his gun, Turner demanded to know why the deputies were trespassing. A short while later, a few more deputy sheriffs arrived, along with two Georgia State Patrol Officers. At one point in the exchange, Turner unholstered the pistol and wielded it above his head. App.26

The deputies fanned out along the fence line that encircled the residence while the state patrol officers took sniper positions with their long rifles. For the next thirty minutes Turner and the deputies argued—the deputies requesting Turner to put down the gun and Turner refusing, pacing back and forth and ordering the deputies to leave. During this exchange, Turner challenged the deputies and dared them "to go ahead and shoot" despite repeated assurances from the deputies that they just wanted Turner to put down his gun. App.27

Sergeant Curran, one of the back-ups who had arrived around the time of the state troopers, had crossed over the fence line to get in a better position, while the other deputies remained at the fence line. Some time later, Deputy Kerger, who was unarmed and standing at the fence line, introduced herself to Turner and pleaded with him to put down the gun. Although Turner responded that he did not have a gun, Kerger pointed out that it was still visibly strapped to his chest. Turner then approached the fence line, at which point Sergeant Curran discharged his beanbag rounds, striking Turner and knocking him down. Turner then opened fire with his pistol, and was killed in the resulting exchange. App.27

B. Procedural Background

Turner's mother, Janet O'Kelly, individually and as the representative of Turner's estate filed suit in the Northern District of Georgia naming as defendants Pickens County Sheriff Donald Craig, Sargent Curran, Deputy Holloway, Deputy Kerger, Deputy Higdon, and Deputy Musgrave of the Pickens County Sheriff's Office. O'Kelley also brought suit against the state patrol officers Salcedo and Curtis. O'Kelley alleged claims under 42 U.S.C. § 1983 and state law against all defendants.

O'Kelley's federal law claims included Fourth Amendment claims against the deputy sheriffs for unlawful seizure and excessive force. The district court granted the deputies' motion to dismiss on qualified immunity grounds.

The district court reasoned that arguable probable cause existed for Turner's seizure and that the exigency of the circumstances obviated the need for a warrant. The district court dismissed Plaintiff's argument that the Eleventh Circuit's recent decision in Moore v. Pederson, clearly established that the deputies had violated Turner's constitutional rights. Recognizing the obvious, and important, dissimilarities between the cases, the district court pointed out that the deputies here had responded to a 911 call made regarding violent threats, while Moore was a complaint about an argument that "'did not sound violent.'" More importantly though, Moore did not involve an individual armed with a gun, nor did anyone appear to be distressed. Finally, the plaintiff in Moore was compliant with officers, while Turner refused to cooperate. Thus, according to the district court, this could not have provided the deputies with fair and clear warning that their conduct violated the law established in *Moore*. *See* App.38-39.

On appeal, a panel of the Eleventh Circuit reversed the district court's qualified immunity analysis entirely. The panel determined that that the facts, as alleged in the Complaint, plausibly alleged that no exigency existed because it would not have been apparent to any reasonable officer that Turner presented a danger to himself, the deputies, or anyone else.

Moving to the clearly established prong, the panel rejected the district court's careful distinctions of Moore and in passing held that "Moore, decided on October 15, 2015, [in which] we held that an 'officer may not conduct a *Terry*-like stop in the home in the absence of exigent circumstances' . . . clearly established, at the time of the encounter on October 24, 2015, that a seizure or entry within a home without a warrant or exigent circumstances violates the Fourth Amendment's prohibition on unreasonable searches and seizures." App.8–10.

REASONS FOR GRANTING THE PETITION

I. The Qualified Immunity Doctrine

The modern doctrine of qualified immunity was born out of Harlow v. Fitzgerald, wherein this Court held that "government officials performing discretionary functions" should generally be "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. 800, 818 (1982). The Harlow Court reasoned that "[r]eliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law," would better address the policy aims underlying the defense—that is, early disposition of cases where appropriate. Id. Thus, "[i]f the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." Id. But before remanding the case to the district court to apply this test, the Harlow Court propounded this qualification: "Nevertheless, if the official pleading the

defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained." Id. The Supreme Court then reiterated that even in this particular circumstance "the defense would turn primarily on objective factors." Id.

II. The Court Has Not Determined Whether A Panel Decision (or Any Judicial Authority Other Than This Court's Own) Constitutes "Clearly Established Law," and Should Determine That No Decision Should Constitute Same Without Complete Exhaustion Of The Appeals Process.

Whether any lower court decision, panel or otherwise, constitutes "clearly established law" for the purposes of qualified immunity remains an open question of law, because this Court has never yet decided that any precedent other than that handed down by the Supreme Court itself can qualify as controlling authority. See District of Columbia v. Wesby, 138 S. Ct. 577, 591 n.8, 199 L. Ed. 2d 453 (2018) (citations omitted) ("We have not yet decided what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity. … We express no view on that question here. Relatedly, our citation to and discussion of various lower court precedents should not be construed as agreeing or disagreeing with them, or endorsing a particular reading of them."). And while this Court has decided matters assuming that a Circuit Court's authority could be a dispositive source of clearly established law in a particular case, it has nevertheless done so without deciding outright that such authority—much less a panel decision short of an *en banc* decision of a Court of Appeals—does in fact

constitute clearly established law. See, e.g., Reichle v. Howards, 566 U.S. 658, 665–66 (2012) (assuming without deciding that Circuit precedent could be a dispositive source of law).

Critically, when a Circuit Court panel issues a decision (as is the case here), the appeals process of the case is not yet exhausted. The panel decision may be reversed or modified by the full Circuit Court sitting *en banc*, or by this Court on further appeal following grant of certiorari. See, e.g., Fed. R. App. P. 35(a). A panel decision does not even function as the law of the case in question until the appeals process is complete or the deadline for further appeal has passed. It is true that, generally, "'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" Pepper v. United States, 562 U.S. 476, 506, 131 S.Ct. 1229, 179 L.Ed.2d 196 (2011) (quoting Arizona v. California, 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983). But the law-of-the-case doctrine is "'something of a misnomer' when used to describe how an appellate court assess a lower court's rulings." Musacchio v. United States, 136 S. Ct. 709, 716, 193 L. Ed. 2d 639 (2016), quoting United States v. Wells, 519 U.S. 482, 487, n. 4, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997). "An appellate court›s function is to revisit matters decided in the trial court. … [I]t is not bound by [rulings below] under the law-of-the-case doctrine." Id.

Here, the Eleventh Circuit panel's implicit holding that a panel decision issued only nine (9) days before the conduct at issue can constitute clearly established law utterly ignores the fact that the applicable decision—assuming it is applicable to the facts of the case at bar—

may yet be overturned. Indeed, the time for a party to request rehearing *en banc*—let alone for issuance of an *en banc* opinion—is not yet exhausted at nine (9) days, because the deadline to file a petition for rehearing *en banc* is, at a minimum and unless otherwise shortened or extended, fourteen (14) days after the issuance of the panel decision. See Fed. R. App. P. 35(c), Fed R. App. P. 40(a)(1). Further, the mandate of the Court of Appeals cannot issue any earlier than seven (7) days after the time to file a petition for rehearing expires, unless the Court of Appeals shortens or extends the time; and the mandate becomes effective only upon issuance. See Fed. R. App. P. 41(b), (c). Therefore, unless a Court of Appeals alters the deadlines, the soonest that a panel decision could constitute the law of the case heard by the panel—and, perhaps, constitute clearly established law—would be twenty-one (21) days after the issuance of the panel decision, some twelve (12) days later than the nine (9) days afforded by the Eleventh Circuit panel in this matter. The time expands further if a petition for rehearing *en banc* is actually filed and denied, or if a motion for stay of mandate is denied, there being a further seven (7) days from whenever the order denying the same is entered. Fed. R. App. P. 41(b). And, even where the mandate is issued following denial of rehearing *en banc*, or after the *en banc* Court of Appeals actually issues a decision following rehearing, there still lies the petition for writ of certiorari to this Court, which must be filed ninety (90) days from the date of the decision or denial of rehearing. See S. Ct. R. 13(1).

Where, as here, a court or panel of a court holds officers to knowledge of a panel decision to constitute "clearly established law" where the appeals process for that decision has yet to terminate, it utterly vitiates

the Harlow Court's admonition that "[i]f the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments(.)" Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). Whether such a decision can constitute "clearly established" law, even though the decision may yet be reversed or altered in the appeals process, is an important question of federal law, undecided, that should be decided by this Court.

III. The Court Has Not Yet Defined, And Lower Courts Have Not Illuminated, What Constitutes "Extraordinary Circumstances" For Which An Officer May Be Entitled To Qualified Immunity, Assuming The Law Is Clearly Established.

This Court has not determined whether a panel decision, or any lower court decision regardless of timing, qualifies as "extraordinary circumstances" for which a reasonable officer may be entitled to qualified immunity; and in fact, to date, only one decision from this Court discusses the "extraordinary circumstances" defense, and this only in the dissent. In the dissent of Anderson v. Creighton, Justice Stephens, joined by Justices Brennan and Marshall, agreed with the Eighth Circuit's denial of an officer's qualified immunity (which decision was reversed by the majority of this Court) and discussed Harlow's "extraordinary circumstances" defense, opining that the officer could not advance a fact-specific claim that a reasonable person in his position could have believed that his particular conduct would not violate rights "that he concedes are clearly established." 483 U.S. 635, 648, 107 S. Ct. 3034, 3043, 97 L. Ed. 2d 523 (1987). The Anderson majority did not address this defense, instead

deciding the matter on the issue of whether the lower court defined the "clearly established" right at issue at too high a level of generality. See generally id. The Anderson dissent, contrary to the majority and to the qualified immunity doctrine propounded in Harlow, argued that the Harlow formulation of qualified immunity (including the "extraordinary circumstances" exception) was inappropriate *ab initio* for law enforcement officers and that, in any case, the officer at issue in that matter could not actually make the showing on the facts of that matter, without offering any discussion of what would constitute "extraordinary circumstances," clearly established law notwithstanding. Id. at 648.

The Courts of Appeals provide little or no light on what are "extraordinary circumstances," in the context of timing or otherwise. Those decisions that do invoke Harlow's language for the most part do not elucidate the contours of this defense, but rather, by and large, simply quote the language as either a general pronouncement of the qualified immunity doctrine, or for some other purpose; and those that do address the exception leave behind them a sea of murky waters as to what the "extraordinary circumstances" defense *would* require . See, e.g., Lugo v. Alvarado, 819 F.2d 5, 7, n.2 (1st Cir. 1987) (discovery to probe extraordinary circumstances should be permitted as appropriate if the defense claims such circumstances to exist); Floyd v. Farrell, 765 F.2d 1, 5, n. 1 (1st Cir. 1985) (discussing "extraordinary circumstances" defense as an exception to Harlow objective reasonableness standard in that it requires proof of subjective knowledge and citing Harlow concurrence for to indicate subjective component of immunity analysis may not have been abandoned); In re City of Philadelphia Litig., 49 F.3d 945, 961 (3d Cir. 1995) (quoting Harlow "extraordinary circumstances"

language without further analysis); Losch v. Borough of Parkesburg, Pa., 736 F.2d 903, 909 (3d Cir. 1984)(same); DiMeglio v. Haines, 45 F.3d 790, 795, n. 1 (4th Cir. 1995) (citations omitted) (since "extraordinary circumstances" exception would turn primarily on objective factors, determination of whether such circumstances exist is a question of law to be determined by the courts); Kenyatta v. Moore, 744 F.2d 1179, 1186 (5th Cir. 1984) (agents created a fact issue as to whether extraordinary circumstances existed and summary judgment therefore denied); Preston v. Smith, 750 F.2d 530, 533 (6th Cir. 1984) (quoting Harlow "extraordinary circumstances" language without further discussion or analysis); Robinson v. Bibb, 840 F.2d 349, 350 (6th Cir. 1988) (four (4) days between applicable decision and underlying conduct "*might* fall within the exception discussed in Harlow") (emphasis supplied); Easter House v. Felder, 852 F.2d 901, 916, n. 15 (7th Cir.), reh'g granted, judgment vacated, 861 F.2d 494 (7th Cir. 1988), and on reh›g, 879 F.2d 1458 (7th Cir. 1989), cert. granted, judgment vacated, 494 U.S. 1014, 110 S. Ct. 1314, 108 L. Ed. 2d 490 (1990) (Harlow "left open the possibility (…) that an official's subjective good faith might, under extraordinary circumstances, immunize behavior that violated a clear rule of law) (citation and quotations omitted); Moore v. Marketplace Rest., Inc., 754 F.2d 1336, 1348 (7th Cir. 1985)(situation wherein deputies' supervisor made the decision to arrest and instructed them to do so may constitute "extraordinary circumstances" for which deputies may be entitled to qualified immunity for succeeding Fourth Amendment violations during arrest); Johnson-El v. Schoemehl, 878 F.2d 1043, 1048 (8th Cir. 1989) (discussing, but not reaching, "extraordinary circumstances" prong of Harlow analysis because sole issue to be decided was "clearly established" prong); Todd v. United States, 849 F.2d 365, 369 (9th Cir. 1988)

(quoting Harlow "extraordinary circumstances" language without further analysis); V-1 Oil Co. v. State of Wyo., Dep't of Envtl. Quality, 902 F.2d 1482, 1489 (10th Cir. 1990) (officer who "conducted a warrantless search on the same day he was advised by fully informed, high-ranking government attorneys that a particular statute, which had not yet been tested in any court, lawfully authorized that particular search (…) should not be expected to have known that the search was unconstitutional"); Barnett v. Hous. Auth. of City of Atlanta, 707 F.2d 1571, 1583 (11th Cir. 1983), overruled by McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) (discussing "extraordinary circumstances" exception without further analysis and remanded for further inquiry as to existence of such circumstances).

As the quagmire in the Circuit Courts shows, assuming *arguendo* that a Court of Appeals panel decision would be factually on point to constitute clearly established law, it remains an important, open question of federal law whether the fact that the decision is reached a mere nine (9) days—or indeed, any particular span of time—prior to the conduct of an officer seeking to benefit from qualified immunity constitutes an "extraordinary circumstance" to which immunity nonetheless attaches.

IV. There Are Widely Conflicting Decisions In Circuit Courts On How Long Before The Underlying Conduct A Case Must Have Been Decided Such That An Objectively Reasonable Officer Has Fair Warning Of The Applicable Clearly Established Law.

This Court has made clear that, in order to deprive officers of qualified immunity, "clearly established" law

must give an objectively reasonable officer "fair warning" that his conduct is unconstitutional. Hope v. Pelzer, 536 U.S. 730, 731, 122 S. Ct. 2508, 2511, 153 L. Ed. 2d 666 (2002). And, prior to Harlow, this Court has also held that "a police officer is not charged with predicting the future course of constitutional law." Pierson v. Ray, 386 U.S. 547, 557, 87 S. Ct. 1213, 1219, 18 L. Ed. 2d 288 (1967). Further, "[a]s a matter of public policy, qualified immunity provides ample protection to all but the plainly incompetent or those who **knowingly** violate the law." Malley v. Briggs, 475 U.S. 335, 335, 106 S. Ct. 1092, 1093, 89 L. Ed. 2d 271 (1986) (emphasis supplied).

In the absence of any Supreme Court precedent addressing whether the recentness of a decision or the fact that the decision proceeds from a panel short of a Court of Appeals *en banc* is germane to the qualified immunity analysis, the Courts of Appeals have floundered in great confusion on the issue of what, exactly, constitutes fair warning in terms of how long a putatively binding judicial decision has been in existence.

In Lintz v. Skipski, a three-judge panel of the Sixth Circuit held that a period of four (4) months (some 120 days) was sufficient for a state social worker to have learned of a new panel decision establishing that due process extended the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes. Lintz v. Skipski, 25 F.3d 304, 306 (6th Cir. 1994). The Sixth Circuit panel noted that "officials must have some time to adjust to and learn about judge-made law as it evolves[,]" and that "[a] court should apply a rule of reason in each case with respect to compliance with new decisions. As with other similar timing problems—for example in equitable

tolling and laches cases—the question is one of fairness in light of all the facts." Id.

In Arebaugh v. Dalton, the State of North Carolina requested a transfer of a Virginia prisoner to North Carolina on grounds that the prisoner had briefly been in the hands of North Carolina authorities, in order to try him on criminal charges there. Arebaugh v. Dalton, 730 F.2d 970, 971 (4th Cir. 1984). The transfer occurred over the prisoner's repeated demands for an extradition hearing, which did not take place prior to transfer. Id. Twelve (12) days prior to the transfer, this Court handed down its opinions in Cuyler v. Adams, 449 US. 433, 101 S.Ct. 703, 66 L.Ed.2d 641 (6-3, 1981), which established the right under federal law of a prisoner to obtain a preliminary hearing prior to a transfer pursuant to an interstate agreement on detainers. Id. at 972. The Fourth Circuit panel held that it was "not unreasonable" for officials to be aware of the Cuyler opinion decided some twelve (12) days earlier, at the very least at the level of the Virginia Attorney General who had an obligation to stay current on developments in the law. Id. But the panel qualified this holding by citing to other, older decisions from both other Circuits and district courts, and noted that the officials had a "direct interest" to have learned of the Cuyler opinion by the nature of the issues presented therein. Id. at 973 ("Twelve days may well turn out to have been sufficient time for someone with a direct interest to have learned of, read and digested the Cuyler v. Adams holding.").

In Robinson v. Bibb, a police officer fatally shot a suspect fleeing the scene of a felony after the suspect disregarded the officer's warning to stop. Robinson v. Bibb, 840 F.2d 349, 350 (6th Cir. 1988). Four days prior,

this court decided Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.E.2d 1 (1985). The officer in Robinson did not dispute that Garner constituted clearly established law that a fleeing suspect had the right not to be shot under these circumstances. Robinson, 840 F.2d at 350. Rather, he made—in the Sixth Circuit panel's words—a "convincing argument" that it was not unreasonable for him not to know of the Garner decision a mere four (4) days after it was handed down. Id. The panel stated that "[a]bsent a showing that the average police officer would know of such a Supreme Court pronouncement within such a period of a few days[,]" the officer's claim to immunity "might fall within the [extraordinary circumstances] exception discussed in Harlow." Id. However, the Sixth Circuit panel did not decide this issue, as it ultimately held that a two-year-old case from the Sixth Circuit itself constituted clearly established law. Id. at 351.

In Garcia by Garcia v. Miera, New Mexico school officials administered a paddling to a nine-year-old child, whose parents asserted substantive due process claims. Garcia by Garcia v. Miera, 817 F.2d 650, 652 (10th Cir. 1987). The officials asserted qualified immunity on the basis that the law governing whether excess corporal punishment can give rise to a substantive due process claim was not clearly established at the time. Id. In a footnote, the Tenth Circuit panel addressed the defendants' contention that a controlling authority, Milonas v. Williams, 692 F.2d 931 (10th Cir. 1982), cert. denied, 460 U.S. 1069, 103 S.Ct. 1524, 75 L.E.2d 947 (1983), where certiorari was denied some five (5) months prior to the incident, was sufficient to put school officials on notice that their conduct would constitute a violation of the student's rights. Id. at 657, n. 10. In so doing, the panel noted that the Milonas decision,

in a bound volume of the Federal Reporter 2d, appeared in the New Mexico Supreme Court's law library, which implied that advance sheets were received several months earlier; and "[t]he publication of advance sheets, as well as the availability of the decision much earlier by way of various legal and professional reporting services available to school officials and their legal advisors, were sufficient to give defendants notice." Id.

In Affiliated Capital Corp. v. City of Houston, the Mayor and City Council of Houston were sued for violation of the Sherman Antitrust Act following a conspiracy to grant an anticompetitive cable television franchise. Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555, 1559 (5th Cir. 1984), abrogated by City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991). On appeal, the Fifth Circuit *en banc* held that the Mayor of Houston was entitled to qualified immunity because "at the time the franchises were granted it was unclear whether or not an antitrust violation occurred under the rule of reason when a city let franchises in an uncompetitive manner(,)" and that "[t]he cases indicating liability, decided as or shortly before the franchise process occurred, were breaking new ground and were not clearly established." Id. at 1569. This holding followed discussions of multiple recent Fifth Circuit cases, including a case decided in July 1978, some 4-5 months prior to the award of the franchise, thus implying that 4-5 months is insufficient time for an official to have fair warning of applicable law insofar as the decision addresses a novel issue or declares a new rule of law. Id.

In Schlothauer v. Robinson, in 1979, law enforcement officers arrested the plaintiff in his home without a

warrant after receiving a complaint that he had abducted and raped a woman, and the plaintiff asserted Fourth Amendment claims. Schlothauer v. Robinson, 757 F.2d 196, 197 (8th Cir. 1985). Eleven (11) days prior to the arrest, a three-judge panel of the Eighth Circuit decided U.S. v. Houle, 603 F.2d 1297, 1300 (8th Cir. 1979), which established that a warrantless arrest of a suspect in his home, in the absence of exigent circumstances, violated the Fourth Amendment. Id. But rather than finding that the officers were entitled to qualified immunity on grounds that they could not be charged with notice of the Houle decision due to its recentness, the panel held that, since this Court had not decided the issue at the time, the law was not "clearly established" at the time of the arrest. Id. at 197-198.

In Bryan v. United States, a Third Circuit panel soundly rejected the notion that effectively brand-new decisions can constitute "clearly established" law of which an officer should be aware, such that the officer would be deprived of qualified immunity. In that case, United States Customs and Border Protections officers searched the cabins of three travelers on a cruise, for which the travelers asserted claims under Bivens, 403 U.S. 388, 91 S.Ct. 1999, 29 L.E.2d 619 (1971) for violation of their Fourth Amendment rights. Bryan v. United States, 913 F.3d 356, 358 (3d Cir. 2019). A mere two (2) days prior, another three judge panel of the Third Circuit ruled for the first time in United States v. Whitted, 541 F.3d 480 (2008) on the constitutional propriety of border searches in the same context as in Bryan—and in fact, involving searches of cabins on board the very same ship. Id. at 361-62. Whitted established, for the first time in the Third Circuit, that because of a passenger's high

expectation of privacy and the level of intrusiveness of such a search, the search of a cruise ship cabin at the border constitutes a "non-routine" search and requires reasonable suspicion. Id. at 362, citing Whitted, 541 F.3d at 489. In relevant part, the Bryan panel held that "it is beyond belief that within two days the government could determine what was 'reasonable suspicion' and what new policy was required to conform to the ruling, much less communicate that new policy to the [customs] officers. We can only conclude that as of [the date of the search], it was not clearly established… that a search of a cruise ship cabin at the border had to be supported by reasonable suspicion." Id. at 363.

In Doby v. Hickerson, discussed further below, an Eighth Circuit panel affirmed the District Court's denial of qualified immunity to a corrections psychiatrist on grounds that, although the dispositive authority—a Supreme Court decision—had been decided only twenty-two (22) days before the underlying incident, this authority nevertheless constituted "clearly established" law because the psychiatrist was, in fact, aware of the development. 120 F.3d 111, 114 (8th Cir. 1997). In so doing, however, the panel noted with approval the District Court's conclusion that the defendant "should not be imputed with immediate knowledge of [the Supreme Court decision]." Id.

It is clear from the Circuit Court decisions post-Harlow that there is mass confusion in the Circuit Courts nationwide as to how long an appellate decision must be in existence before it can give an officer "fair warning" that his conduct is unconstitutional. This petition presents the Supreme Court with the opportunity—assuming that a given decision is otherwise on point and dispositive—to

clarify how much time must pass before an objectively reasonable officer can be charged with notice of the new development in law such that he would not be entitled to qualified immunity; and therefore, certiorari should be granted.

V. The Eleventh Circuit Panel's Decision Conflicts with A Decision Of The Eighth Circuit On The Question Of Whether A Public Employee's subjective Knowledge Of Developments Of Law Is A Factor In Determining Qualified Immunity.

More than ten years prior to the decision of the Eleventh Circuit panel at issue here, another three-judge panel—this, of the Eighth Circuit—decided Doby v. Hickerson, 120 F.3d 111 (8th Cir. 1997). The Doby panel applied the qualified immunity analysis established in Harlow, 467 U.S. 800 (1982), via the definition of "clearly established" law announced by this Court in Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3024, 3039, 97 L.Ed.2d 523 (1987)—to wit, that in order to be "clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Doby, 12 F.3d at 113 (citation and quotation omitted). In Doby, the defendant, a psychiatrist employed by a State department of corrections, prescribed antipsychotic medications to the plaintiff Doby, an inmate, and directed that they be administered involuntarily after Doby began demonstrating bizarre behavior. Id. at 112. Doby experienced side effects and brought suit, asserting claims under the Due Process Clause. Id. at 113.

Twenty-two (22) days after Hickerson gave the order, this Court decided Washington v. Harper, 494 U.S. 210,

221-22, 110 S.Ct. 1028, 1036, 108 L.Ed.2d 178 (1990). Doby, 120 F.3d at 113. Harper established specific procedural protections as minimal constitutional requirements for satisfying procedural due process when a state involuntarily administers antipsychotics to an inmate. Harper, 494 U.S. at 233, 235. Post-Harper, the treatment of the inmate as ordered by Hickerson continued. The Doby panel held that Hickerson was entitled to qualified immunity for his order and all administrations of medication *prior to* the date of the decision in Harper, but was not entitled to immunity for the continued treatment *after* Harper. Doby, 120 F.3d at 113. Central to the Eighth Circuit panel's analysis was evidence that the state attorney general's officer had in fact advised Hickerson's unit that Harper was pending and that the unit revised its policy on forced medication in anticipation of the Supreme Court's ruling, coupled with a finding that Hickerson was made aware of the new policy but failed to follow it. Id. The Eighth Circuit panel thereby implicitly recognized a subjective component of the qualified immunity analysis left open by Harlow—the officer's own awareness of the change in clearly established law.

In contrast, the Eleventh Circuit panel's decision in *this* matter, left undisturbed by the Court *en banc*, completely ignored the Harlow subjective knowledge component. Indeed, the Eleventh Circuit panel engaged in very little analysis at all, instead declaring *ipse dixit* that Moore constituted "clearly established" law and that a reasonable officer must be held to knowledge of the same. The panel's decision reads, in relevant part, as follows:

> "In *Moore*, decided on October 15, 2015, we held that "an officer may not conduct a *Terry*-

> like stop in the home in the absence of exigent circumstances," consent, or a warrant. *Id.* at 1047, 1054. Thus, binding precedent clearly established, at the time of the encounter on October 24, 2015, that a seizure or entry within the home without a warrant or exigent circumstances violates the Fourth Amendment's prohibition on unreasonable searches and seizures. And the parameters of the exigent-circumstances doctrine were well-established before then, including, as relevant here, that circumstances do not qualify as exigent unless "the police reasonably believe an emergency exists which calls for an immediate response to protect citizens from imminent danger." …
>
> Here, **no reasonable officer could believe** that he or she "faced an emergency that justified acting without a warrant." … Based on the factual allegations in the complaint, which we must accept as true, this was not a situation where it would be "difficult for an officer to determine how the relevant legal doctrine"—here exigent circumstances—would apply. … Accordingly, qualified immunity is not appropriate at this stage."

App.19-20 (citations omitted) (emphasis supplied).

The Eleventh Circuit panel therefore implicitly applied a strictly objective test, thereby abrogating the Harlow good faith defense and also creating conflict with the Eighth Circuit panel's decision in Doby which turned, to the contrary, on an analysis of subjective knowledge.

Certiorari should be granted in order to resolve this conflict between the Circuits.

VI. The Eleventh Circuit Panel Decided An Important Federal Question In Direct Conflict With Relevant Decisions Of This Court Because It Applied A General Principal Of Law To Find "Clearly Established" Law In Contravention Of This Court's Precedent Mandating That A Case Must Be Sufficiently Factually Similar To Put Public Employees On Notice That Their Particular Actions Are Unconstitutional.

Post-Harlow, this Court has time-and-again reversed and criticized lower courts for doing precisely what the Eleventh Circuit panel has done: finding "clearly established law" on the basis of a generally applicable principal of law, rather than particularized facts analogous to the underlying conduct at bar, and thereby applying the wrong analysis for qualified immunity.

In Harlow itself, this Court held that government officials performing discretionary functions generally are shielded from liability so long as their conduct "does not violate *clearly established* statutory or constitutional rights" of which a reasonable person should have known, but did not define the contours of "clear establishment." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982) (emphasis supplied).

Then, in Mitchell v. Forsyth, this Court articulated that the determination hinges upon "whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions" or (at

the summary judgment stage) "whether the law clearly proscribed the actions the defendant claims he took." U.S. 511, 528, 105 S. Ct. 2806, 2816, 86 L. Ed. 2d 411 (1985).

Subsequently, in Anderson v. Creighton, the Court held that

> "[t]he operation of this standard [of objective legal reasonableness in light of clearly established law] ... depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of Harlow. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. Harlow would be transformed from a guarantee of immunity into a rule of pleading. Such an approach, in sum, would destroy 'the balance that our cases strike between the interests in vindication of citizens› constitutional rights and in public

> officials› effective performance of their duties,' by making it impossible for officials 'reasonably [to] anticipate when their conduct may give rise to liability for damages.' … It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful …; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 639–40 (1987) (citations omitted).

In Anderson, the Eighth Circuit held that the petitioner was not entitled to qualified immunity because the right of persons to be protected from warrantless searches of their home in the absence of probable cause and exigent circumstances, generally defined, was clearly established. Id. at 638. This Court reversed the Eighth Circuit, admonishing that

> [the Eighth Circuit's] brief discussion of qualified immunity consisted of little more than an assertion that a that a **general** right Anderson was alleged to have violated—the right to be free from warrantless searches of one's home

> unless the searching officers have probable cause and there are exigent circumstances—was clearly established. The Court of Appeals specifically refused to consider the argument that it was *not* clearly established that the circumstances with which Anderson was confronted did not constitute probable cause and exigent circumstances. The previous discussion should make clear that this refusal was erroneous. It simply does not follow immediately from the conclusion that it was firmly established that warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment that Anderson's search was objectively legally unreasonable.

Anderson, 483 U.S. at 640-41 (1987) (bold emphasis supplied).

There followed a string of decisions from this Court reiterating the principle articulated in Anderson that the invocation of an abstract right, itself clearly established, is not sufficient to deprive a governmental employee of qualified immunity—the right must be "defined at the appropriate level of specificity" in order for the violation to be "clearly established." Wilson v. Layne, 526 U.S. 603, 615, 119 S. Ct. 1692, 1700, 143 L. Ed. 2d 818 (1999) (affirming Fourth Circuit's reversal of District Court's denial of summary judgment on qualified immunity because, at the time of the underlying incident, no court had held that the conduct in question—namely, media presence during a police entry into a residence—violated the Fourth Amendment); see also Saucier v. Katz, 533 U.S.

194, 201, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001), receded from on other grounds by Pearson v. Callahan, 555 U.S. 223, 129 S.Ct. 808 (2009) (reversing denial of summary judgment on qualified immunity and noting that "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation that he confronted.") (emphasis supplied); Brosseau v. Haugen, 543 U.S. 194, 199-201, 125 S. Ct. 596, 599, 160 L. Ed. 2d 583 (2004) (reinstating grant of summary judgment on qualified immunity because Court of Appeals "was mistaken" in applying general tests to Fourth Amendment excessive force claims and holding that law was not clearly established because precedent invoked "undoubtedly show that this area [of acceptable vs. excessive force] is one in which the result depends very much on the facts of each case" and "[n]one of them squarely governs the case here."); Ashcroft v. al-Kidd, 563 U.S. 731, 741, 131 S. Ct. 2074, 2083, 179 L. Ed. 2d 1149 (2011) (reversing Ninth Circuit's affirmation of District Court's denial of motion to dismiss on qualified immunity grounds and holding that, in determining whether the underlying conduct violates clearly establish law, "[w]e do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate."); Stanton v. Sims, 571 U.S. 3, 7, 9, 134 S. Ct. 3, 5, 187 L. Ed. 2d 341 (2013) (admonishing Ninth Circuit for denial of officer's qualified immunity for entry into home in hot pursuit of suspect where precedent had not settled whether said situation violated the Constitution and where cases relied on were not factually similar because they did not involve hot pursuit); White v. Pauly, 137 S. Ct. 548, 552, 196 L. Ed. 2d 463 (2017) (Tenth Circuit "misunderstood the 'clearly established' analysis" because

"[i]t failed to identify a case where an officer acting under similar circumstances (…) was held to have violated the Fourth Amendment.").

In this matter, the Eleventh Circuit panel did precisely what this Court, in the wealth of precedent above, has instructed lower courts not to do: it applied a *general* principal of law to deny an officer qualified immunity, instead of analyzing previous case law for factually similar circumstances that would put an officer on notice that his conduct violated a clearly established constitutional right. The "binding precedent clearly established," as the panel called it, was nothing more than the generalized proposition articulated in Moore that "an officer may not conduct a Terry-like stop in the home in the absence of exigent circumstances, consent, or a warrant."[1] From this, the panel held that the Petitioners were not entitled to qualified immunity at the motion to dismiss stage, thereby stripping them of that immunity despite failing—exactly as the Tenth Circuit failed in White—to identify a single factually similar case, whether Moore itself or any other.

But, simply put, the nonviolent, nonthreatening exchange in Moore could not possibly have alerted an objectively reasonable officer that his actions in this highly tense and dangerous situation would have violated the constitutional rights of the suspect. It was blatant error to hold that Moore, a factually distinct case, constituted "clearly established" law and that it did so for a general constitutional proposition, in direct conflict with this Court's decisions requiring examination of particularized circumstances of the case in light of previously developed

1. App.18-19.

case law. This Court should grant certiorari and clarify that the Circuit Courts must not continue to commit the Eleventh Circuit's error.

VII. Whether A Factually Distinct Panel Decision Decided Only Nine (9) Days Before A Public Employee's Conduct Can Strip The Employee Of Qualified Immunity Should Be Decided By This Court, Because The Eleventh Circuit Panel's Decision Chills Public Service By Law Enforcement By Raising The Specter of Surprise Liability.

In Harlow, this Court recognized the severe chilling effect on law enforcement procedures and services posed by the threat of unending litigation and liability in the absence of qualified immunity, stating that "public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability. … [I]t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.' *Gregoire v. Biddle*, 177 F.2d 579, 581 (CA2 1949), cert. denied, 339 U.S. 949, 70 S.Ct. 803, 94 L.Ed. 1363 (1950)." Harlow, 457 U.S. 800, 806, 814, 102 S. Ct. 2727, 2736, 73 L. Ed. 2d 396 (1982).

Post-Harlow, the Court has returned to this theme time and again, cautioning against the paralysis of public

services that must inevitably result if officers cannot reliably predict whether their conduct is constitutional, particularly in intense situations requiring quick and decisive action. See, e.g., Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411 (1985), quoting Harlow, 457 U.S. at 816 ("the 'consequences' with which we were concerned in Harlow are not limited to liability for money damages; they also include 'the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.'"); Davis v. Scherer, 468 U.S. 183, 195, 104 S. Ct. 3012, 3019, 82 L. Ed. 2d 139 (1984) ("The qualified immunity doctrine recognizes that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated."); Atwater v. City of Lago Vista, 532 U.S. 318, 351, 121 S. Ct. 1536, 1556, 149 L. Ed. 2d 549 (2001) ("[E]ven where personal liability does not ultimately materialize, the mere specter of liability may inhibit public officials in the discharge of their duties, *ibid.*, for even those officers with airtight qualified immunity defenses are forced to incur the expenses of litigation and to endure the "diversion of [their] official energy from pressing public issues. Further, and somewhat perversely, [a] disincentive to arrest … would be most pronounced in the very situations in which police officers can least afford to hesitate: when acting on the spur (and in the heat) of the moment…." (citations and quotations omitted).

The policy implications of the Eleventh Circuit's decision here are dire: if charged with up-to-the-minute knowledge of case law developments, existing officers will

hesitate to assist or respond to dangerous circumstances where their presence is vital; and prospective officers may well be deterred from joining law enforcement agencies in the first place, threatened by the fear of limitless suit and being taken by surprise by such developments. Further still, the impact on rural, impoverished, and underserved communities cannot be understated. According to the U.S. Department of Justice and a 2015 report from the Bureau of Justice Statistics, approximately half of law enforcement departments nationwide field fewer than ten (10) officers, and approximately 70 percent of them serve communities of fewer than ten thousand (10,000) people.[2] While a large, well-funded metropolitan law enforcement agency *might* have the resources to fund a legal staff to provide constant updates and training to its officers concerning recent and current developments in judicial decisions, it is inconceivable that a rural agency would be able to do so. Thus, the Eleventh Circuit panel's decision here, and its implications, threatens to result in further underservice by law enforcement to those communities who need it most—those small, rural communities which are already underserved. The need to settle the questions presented herein is clear, and certiorari should be granted.

CONCLUSION

Certiorari should be granted because this Petition presents important and undecided questions of law concerning whether (1) a panel decision issued only nine (9) days before a government officer's actions can constitute

2. Faye Elkins, Concerns of Rural Law Enforcement: What We Heard from the Field, 12 Dispatch 8 (Sep. 2019), https://cops.usdoj.gov/html/dispatch/09-2019/rural_le.html#2.

clearly established law that would deprive him of qualified immunity and (2) whether the recentness of such a decision constitutes extraordinary circumstances such that an officer would not have fair warning of the same; because the Eleventh Circuit panel has clearly erred in the qualified immunity analysis articulated by this court; because there is great confusion among the Circuit Courts on the questions presented herein; and because, should the Eleventh Circuit panel's decision stand, government itself stands to be paralyzed by its officers' fear of constant litigation and surprise denials of qualified immunity.

Respectfully submitted, this 27th day of January, 2020.

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JULY 16, 2019

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-14512
Non-Argument Calendar

JANET TURNER O'KELLEY, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN HARLEY TURNER, JOHN ALLEN TURNER,

Plaintiffs-Appellants,

v.

SHERIFF DONALD E. CRAIG, SGT. TRAVIS PALMER CURRAN, A.K.A. TRAVIS LEE PALMER, DEP. FRANK GARY HOLLOWAY, DEP. KEELIE KERGER, DEP. BILL HIGDON, DEP TODD MUSGRAVE, *et. al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia.

D.C. Docket No. 2:17-cv-00215-RWS.

July 16, 2019, Decided

Before MARCUS, ROSENBAUM, and JULIE CARNES, Circuit Judges.

Appendix A

PER CURIAM:

This case concerns a deadly encounter between John Harley Turner ("Harley") and several law-enforcement officers on the night of October 24, 2015. The officers made contact with Harley in the course of investigating a 911 call where a hunter reported that a resident, later determined to be Harley, had accused some hunters of trespassing on his land and had threatened them with bodily harm if they did not leave. Harley spoke with the officers from behind a closed gate on property he shared with his mother and her husband. Harley was armed and refused multiple commands to put the gun down, but he never threatened the officers or pointed the gun at them. After more than 30 minutes of fruitless negotiation, one of the officers lured Harley closer to the fence under the guise of inviting him to talk. As Harley approached, another officer, who had sneaked over the fence onto Harley's property, fired three rounds from a twelve-gauge shotgun filled with shot-filled beanbags, striking Harley. Harley returned fired, prompting the other officers to shoot and kill him.

Harley's mother and father, Janet Turner O'Kelley and John Allen Turner, respectively (collectively, "Plaintiffs"), filed suit under 42 U.S.C. § 1983, alleging several claims on his behalf, including (1) an unlawful-seizure claim against the officers who were involved in the events that led to Harley's death; and (2) a failure-to-train claim against Donald Craig, the Sheriff of Pickens County. They also brought a state-law claim for wrongful death. The district court granted the Defendants' motion to dismiss, which invoked the defenses of qualified and official immunity. Plaintiffs now appeal.

Appendix A

I.

At around 8:30 p.m. on October 24, 2015, a hunter called 911 to report that he and other hunters had been threatened by a resident while coon hunting.[1] The hunter claimed that a person on a neighboring property had yelled at them through the woods, accusing them of trespassing and threatening them with bodily harm if they did not leave. After ensuring that the hunter was safe, the 911 operator reported the incident to law enforcement as a "completed domestic disturbance."

Pickens County Deputies Bill Higdon, Frank Holloway, and Keelie Kerger responded to the call. They spoke with the hunter and then proceeded to the subject property at 1607 Carver Mill Road, arriving at around 9:00 p.m.

Harley lived at 1607 Carver Mill in a cabin behind the main house, which was occupied by Harley's mother, Janet Turner O'Kelley ("Mrs. O'Kelley"), and her husband, Stan O'Kelley ("Mr. O'Kelley"). The two residences were enclosed in a fence with a closed gate that blocked the driveway.

When the deputies arrived, they spoke with Mr. O'Kelley outside the closed gate. Mr. O'Kelley informed

1. We present the facts as alleged in Plaintiffs' complaint, accepting them as true for purposes of this appeal. *See Gates v. Khokhar*, 884 F.3d 1290, 1296 (11th Cir. 2018) ("When ruling on a motion to dismiss, we accept the facts alleged in the complaint as true, drawing all reasonable inferences in the plaintiff's favor." (quotation marks and alteration omitted)).

them that the 911 call was about his stepson Harley and that Harley was armed. The deputies sent Mr. O'Kelley to a neighbor's house.

Around this same time, Harvey, shirtless and armed with a pistol in a chest holster, approached the gate from the cabin with a flashlight talking loudly about trespassing. Shouting and with guns raised, the deputies ordered Harley to put his hands up and his gun down. The deputies did not immediately identify themselves as law-enforcement officers. Harley replied, "I already put the gun down," and asked, "Why are you trying to trespass?" One of the deputies responded, "We're not trespassing; we're cops."

Meanwhile, additional law-enforcement officers arrived on the scene. According to the complaint, State Troopers Rodney Curtis and Jonathan Salcedo "took up sniper positions" armed with rifles. Pickens County Deputies Travis Curran and Todd Musgrave joined the other deputies armed with shotguns, one of which was loaded with "less-lethal" beanbag rounds.

Harley began walking back towards his house with his hands above his head. He held the flashlight in one hand and the gun in the other. The deputies ordered him to put the gun down and get on the ground. Harley briefly turned around and told the officers to just keep trespassers off his property. He then turned back and continued on his way, while the deputies, with guns still pointed at him, ordered him to come back to the fence.

Mrs. O'Kelley arrived at the property at around 9:05 p.m., just over 30 minutes after the 911 call and five minutes after the first deputies arrived. She saw that Deputy Curran had a shotgun, and she told the officers that there should be no shooting and that Harley would defend himself if they opened fire. The deputies would not let Mrs. O'Kelley talk to Harley, and they directed her away from the property.

A tense verbal back-and-forth ensued for approximately 30 minutes. The deputies repeatedly tried to get Harley to put his gun down. Harley paced back and forth, wearing his gun in the chest holster, and asserted that he simply wanted the officers to keep trespassers away from his property. Harley was distressed and perceived the officers as threatening him. Several times, he told them to "go ahead and shoot me." The deputies repeatedly assured Harley they would not shoot him.

In the middle of this back-and-forth, at around 9:12 p.m., Harley announced that he was tired and wanted to go to bed, and that he was going to his cabin to get a drink of water. While he was away, Deputies Curran and Higdon, armed with shotguns, crossed the fence into the property and took cover in order to "try to get a better position" for a shot on Harley.

Harley returned from his cabin with a flashlight in one hand and a jug of water in the other. His gun remained in his chest holster. He began talking to the deputies again, calling them trespassers and telling them: "I have never crossed this line, and y'all were the ones have been the

fuckin' aggressors." Harley announced that he was tired and would like to go to bed.

At Deputy Curran's urging, Deputy Kerger invited Harley to come talk at the fence for the purpose of drawing him closer to a spot where Curran could get a good shot. Kerger told Harley that she did not have her gun, and she indicated that she could take a statement from him if he put his gun down. Harley responded, "I already did." Kerger pointed out that the gun was still on Harley's chest. They continued talking, with Kerger saying that she would not talk with him until he took his gun out of its holster and put it on the ground.

About thirty seconds later, an officer stated in a low voice, "He's coming back towards the fence." At that point, Deputy Curran fired three beanbag rounds from his shotgun. At least one round struck Harley and knocked him down. Harley drew his pistol and returned fire. The other officers opened fire, killing Harley.

II.

In October 2017, Plaintiffs filed a complaint in the U.S. District Court for the Northern District of Georgia, alleging two federal claims under 42 U.S.C. § 1983. First, Plaintiffs alleged an unlawful warrantless seizure of Harley within the curtilage of his home, in violation of the Fourth Amendment, by Deputies Curran, Higdon, Holloway, Kerger, and Musgrave (the "Deputies"), and by Troopers Curtis and Salcedo (the "Troopers"). Second, Plaintiffs alleged that Sheriff Craig failed to adequately train deputies in arrest procedures and the use of force.

They also alleged a state-law wrongful-death claim against the Deputies.

The defendants filed motions to dismiss, invoking the federal defense of qualified immunity against the illegal-seizure claim and the state defense of official immunity against the wrongful-death claim. As to the failure-to-train claim, Sheriff Craig maintained that it failed because there was no underlying constitutional violation and because Plaintiffs' allegations were vague and conclusory. The district court granted the motions to dismiss, and Plaintiffs now appeal.

III.

We review *de novo* the grant of a motion to dismiss, accepting the allegations in the complaint as true and drawing all reasonable inferences in the plaintiff's favor. *Paez v. Mulvey*, 915 F.3d 1276, 1284 (11th Cir. 2019). "To withstand a motion to dismiss under Rule 12(b)(6), [Fed. R. Civ. P.], a complaint must include enough facts to state a claim to relief that is plausible on its face." *Hunt v. Aimco Props., L.P.*, 814 F.3d 1213, 1221 (11th Cir. 2016) (quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

IV.

Qualified immunity protects government officials from individual liability for job-related conduct unless

they violate clearly established law of which a reasonable person would have known. *Keating v. City of Miami*, 598 F.3d 753, 762 (11th Cir. 2013). "It serves the purpose of allowing government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation." *Carter v. Butts Cty.*, 821 F.3d 1310, 1318-19 (11th Cir. 2016) (quotation marks omitted). Because qualified immunity is a defense not only from liability, but from suit, the defense may be raised in a motion to dismiss. *Sebastian v. Ortiz*, 918 F.3d 1301, 1307 (11th Cir. 2019).

Officials invoking qualified immunity must show first that they were acting within the scope of their discretionary authority. *Id.* There is no dispute that the Deputies and Troopers were engaged in discretionary duties on the night of October 24, 2015. Accordingly, the burden shifted to Plaintiffs to show that qualified immunity did not apply. *See id.*

The qualified-immunity inquiry "turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." *Pearson v. Callahan*, 555 U.S. 223, 244, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (quotation marks omitted). "To deny qualified immunity at the motion to dismiss stage, we must conclude both that the allegations in the complaint, accepted as true, establish a constitutional violation *and* that the constitutional violation was 'clearly established.'" *Sebastian*, 918 F.3d at 1307 (emphasis in original). We may address these two prongs in either order. *Pearson*, 555 U.S. at 236.

Plaintiffs contend that the Deputies and Troopers violated clearly established Fourth Amendment law when, in the absence of a warrant or exigent circumstances, they seized Harley within the curtilage of his home, trespassed on his property, and then used force against him that foreseeably caused his death.

A.

We start by considering whether the defendants transgressed Harley's Fourth Amendment rights on the night of October 24, 2015. Accepting the facts alleged in the complaint as true, we find that the Deputies did, but not the Troopers.

"[W]hen it comes to the Fourth Amendment, the home is first among equals." *Florida v. Jardines*, 569 U.S. 1, 6, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013). At the Amendment's "very core" is the right of an individual "to retreat into his [or her] own home and there be free from unreasonable governmental intrusion." *Id.* (quotation marks omitted). This protection extends to "the area immediately surrounding and associated with the home"—what courts refer to as the "curtilage"—which is regarded "as part of the home itself for Fourth Amendment purposes." *Id.* (quotation marks omitted).

Given the special protection afforded the home, searches and seizures within a home or its curtilage and without a warrant are presumptively unreasonable. *United States v. Walker*, 799 F.3d 1361, 1363 (11th Cir. 2015); *Bashir v. Rockdale Cty., Ga.*, 445 F.3d 1323, 1327 (11th Cir.

2006). This general rule is "subject only to a few jealously and carefully drawn exceptions," which are consent and exigent circumstances. *McClish v. Nugent*, 483 F.3d 1231, 1240 (11th Cir. 2007) (quotation marks omitted). Absent consent or exigent circumstances, probable cause alone is not enough to validate a warrantless search or arrest. *Bashir*, 445 F.3d at 1328. Nor may officers conduct a warrantless seizure under *Terry*[2] within the home without consent or exigent circumstances. *Moore v. Pederson*, 806 F.3d 1036, 1045 (11th Cir. 2015).

A variety of circumstances may give rise to an exigency sufficient to justify a warrantless entry, including law enforcement's need to provide emergency assistance, engage in "hot pursuit" of a fleeing suspect, or prevent imminent destruction of evidence. *Missouri v. McNeely*, 569 U.S. 141, 149, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013). Likewise, we have held that "emergency situations involving endangerment to life fall squarely within the exigent circumstances exception." *United States v. Holloway*, 290 F.3d 1331, 1337 (11th Cir. 2002). "While these contexts do not necessarily involve equivalent dangers, in each a warrantless [entry] is potentially reasonable because there is compelling need for official action and no time to secure a warrant." *McNeely*, 569 U.S. at 149 (quotation marks omitted); *Feliciano v. City of Miami*, 707 F.3d 1244, 1251 (11th Cir. 2013) ("Exigent circumstances . . . arise when the inevitable delay incident to obtaining a warrant must give way to an urgent need for immediate action." (quotation marks omitted)).

2. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) (permitting brief, investigatory seizures based on reasonable suspicion).

We look to the "totality of the circumstances" to determine whether officers "faced an emergency that justified acting without a warrant." *McNeely*, 569 U.S. at 149. In other words, we must "evaluate each case of alleged exigency based on its own facts and circumstances." *Id.* at 150 (quotation marks omitted).

The Deputies and Troopers offer different arguments in support of the judgment in their favor. The Deputies concede that Harley was seized within the curtilage of his home and that Deputies Curran and Hidgon entered the curtilage without a warrant. But they contend that their conduct was reasonable because they had probable cause to arrest, or at least reasonable suspicion to conduct a *Terry* stop, and that exigent circumstances validated the warrantless seizure and entry. Further, they contend that Curran's use of beanbag rounds was a reasonable response to what the deputy viewed as a "potential deadly encounter."

For their part, the Troopers maintain that the allegations in the complaint do not implicate them in any of the alleged Fourth Amendment violations. They also dispute that Harley was within the curtilage of his home, and they contend that their actions—responding with lethal force once Harley opened fire—were objectively reasonable under the circumstances.

1. Troopers

We address the Troopers' arguments first. Ultimately, we agree that the complaint does not state a plausible Fourth Amendment claim against them.

It is well established that § 1983 "requires proof of an affirmative causal connection between the official's acts or omissions and the alleged constitutional deprivation." *Zatler v. Wainwright*, 802 F.2d 397, 401 (11th Cir. 1986). Such a "causal connection" may be established by showing that "the official was personally involved in the acts that resulted in the constitutional deprivation." *Id.* "[T]he inquiry into causation must be a directed one, focusing on the duties and responsibilities of each of the individual defendants whose acts or omissions are alleged to have resulted in a constitutional deprivation." *Williams v. Bennett*, 689 F.2d 1370, 1381 (11th Cir. 1982).

Here, Plaintiffs did not allege sufficient facts, accepted as true, to show that Troopers Curtis and Salcedo were personally involved in the acts that resulted in the alleged constitutional deprivations. Before the fatal shooting, the Troopers' participation in the events at 1607 Carver Mill was limited to taking "sniper positions" with rifles. Plaintiffs contend that Harley was seized soon after by various commands, but the complaint indicates that it was the "the *deputies*" who "shouted at him to put the gun down and get on the ground" and then "ordered him to come back to the fence." Thus, despite the Troopers' presence on the scene, it does not appear from the complaint that they were personally involved in the acts that allegedly resulted

in Harley's seizure. Nor did they enter the property or fire the beanbag rounds that provoked the firefight. While the Troopers did respond with lethal force once Harley opened fire, Plaintiffs do not contend that this use of force was itself unreasonable, nor could we find that it was. Because the Troopers' acts or omissions were not alleged to have resulted in a constitutional deprivation, we affirm the dismissal of the complaint as to them.

Plaintiffs respond that the Troopers are liable for failing to intervene and prevent an excessive use of force. But as the district court noted, "[t]his theory of liability is not alleged in the Complaint." For that reason, we decline to consider whether the Troopers could be held liable under a failure-to-intervene theory. In any case, the complaint's allegations do not establish that the Troopers had time and were in a position to intervene. *See Priester v. City of Riviera Beach, Fla.*, 208 F.3d 919, 927 (11th Cir. 2000). Specifically, we cannot tell from the complaint whether the Troopers were even aware of Deputy Curran's plan to use force to end the encounter.

For these reasons, we affirm the judgment in favor of the Troopers.

2. Deputies

But as to the Deputies, we conclude that the complaint plausibly establishes that they violated Harley's Fourth Amendment rights. At the outset, we note that the parties agree on certain points. Plaintiffs and the Deputies agree that Harley was seized within the curtilage of his home—

exactly when is not particularly important for the time being—and that Deputies Curran and Higdon entered the curtilage. Because the Deputies lacked a warrant, the parties also agree that the Deputies needed consent or exigent circumstances. For purpose of this opinion only, we assume without deciding that the parties are correct on these matters.

While the parties dispute the existence of probable cause or reasonable suspicion, we need not address that issue. Even assuming probable cause to arrest existed, no exception to the warrant requirement applied on the facts alleged.

Harley clearly did not consent, and no exigent circumstances existed here. The Deputies contend, and the district court concluded, that exigent circumstances existed because they faced an "emergency situation[] involving endangerment to life." *Holloway*, 290 F.3d at 1337. This exception applies "[w]hen the police reasonably believe an emergency exists which calls for an immediate response to protect citizens from imminent danger." *Id.*

But no reasonable officer would believe that Harley's conduct presented an *imminent* risk of serious injury to the Deputies or others. By the time the officers arrived on the scene, the events that gave rise to the 911 call by the hunter were complete, the hunters were safely away from the property, and Harley was in his cabin. There had been no report of gunshots, only a verbal and conditional threat of bodily harm against a group of alleged trespassers who were no longer in the area. "This is not the stuff of which

life- or limb-threatening emergencies that constitute 'exigent circumstances' are made." *Moore*, 806 F.3d at 1045; *cf. Holloway*, 290 F.3d at 1338 ("The possibility of a gunshot victim lying prostrate in the dwelling created an exigency necessitating immediate search.").

The lack of exigent circumstances is further reinforced by the relatively minor nature of the offense. *See Welsh v. Wisconsin*, 466 U.S. 740, 753, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984) ("[A]n important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made."). Even if we assume that Harley's threat of harm to the hunters constituted a "terroristic threat" within the meaning of O.C.G.A. § 16-11-37(b)(1), it appears that it would qualify as only a misdemeanor offense under the statute. *See* O.C.G.A. § 16-11-37(d)(1) (stating that "[a] person convicted of the offense of a terroristic threat shall be punished as a misdemeanor," unless the threat "suggested the death of the threatened individual"). In these circumstances, according to the Supreme Court, "application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned." *Welsh*, 466 U.S. at 752-53 (noting that most courts "have refused to permit warrantless home arrests for nonfelonious crimes").

Nor did exigent circumstances arise at some point before Deputy Curran discharged his shotgun from within the curtilage of Harley's property. The mere presence of Harley's unconcealed gun did not give rise to exigent

circumstances.[3] *Cf. United States v. Santa*, 236 F.3d 662, 669 (11th Cir. 2000) ("The mere presence of contraband, however, does not give rise to exigent circumstances." (quotation marks omitted)). Our Constitution protects "the right to keep and bear arms for defense of the home," *Dist. of Columbia v. Heller*, 554 U.S. 570, 632, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), and no facts alleged in the complaint suggest that the Deputies had reason to believe that Harley's possession of the gun was unreasonably dangerous or even unlawful. *Cf. United States v. Burgos*, 720 F.2d 1520, 1526 (11th Cir. 1983) (exigent circumstances permitted warrantless entry of a house "laden with arms and an unknown number of people inside," where the officers had observed the homeowner, who previously had purchased 192 guns without a proper license, take possession of "two large boxes filled with arms").

To be sure, that Harley was distressed, refused to put down the gun, and was generally uncooperative indicates a fraught situation. But it does not show an "*urgent* need for *immediate* action." *Feliciano*, 707 F.3d at 1251 (emphasis added). Before Deputy Curran discharged his shotgun, Harley did not engage in any violent or threatening behavior. He never pointed the gun at the Deputies or threatened them with it, and the gun remained in his chest holster for the vast majority of the encounter. Plus,

3. The cases the Deputies cite as factually analogous both involved seizures in public places, so they are unpersuasive in evaluating the situation here, involving a seizure within the curtilage of a home. *See Embody v. Ward*, 695 F.3d 577 (6th Cir. 2012) (seizure in a public park); *Deffert v. Moe*, 111 F. Supp. 3d 797 (W.D. Mich. 2015) (seizure on a public street).

he repeatedly informed the defendants that he simply wanted to end the encounter and go to sleep.

Moreover, Harley's failure to put down the gun, despite the Deputies' orders, did not create an exigency. If exigent circumstances did not exist at the time those commands were made, as we have concluded, Harley was not validly seized at the time those commands were made. And because he was not validly seized, he was not required to comply with the Deputies' commands. *See Moore*, 806 F.3d at 1045 (absent exigent circumstances or a warrant, a seizure inside the home is not valid and the occupant is "free to decide not to answer [the officer's] questions"). So his failure to comply with the Deputies' unlawful orders cannot, in and of itself, give rise to exigent circumstances.

Finally, as to the initial shooting by Deputy Curran, the allegations in the complaint indicate that Harley approached the fence as part of a ruse engineered by Curran—for the purpose of drawing Harley closer to a spot where Curran could get a good shot—so the deputy's decision to fire upon Harley with beanbag rounds cannot be justified as a split-second response to a perceived threat.

Considering the totality of the circumstances, it was not reasonable for the Deputies to believe that they "faced an emergency that justified acting without a warrant." *McNeely*, 569 U.S. at 149. We therefore conclude Plaintiffs plausibly established that the Deputies violated Harley's constitutional rights when, in the absence of a warrant or exigent circumstances, they seized him within the

curtilage of his home and entered the curtilage for the apparent purpose of conducting an arrest. Because this conduct was unlawful, "there [wa]s no basis for any threat or any use of force." *Jackson v. Sauls*, 206 F.3d 1156, 1171 (11th Cir. 2000); *see Zivojinovich v. Barner*, 525 F.3d 1059, 1071 (11th Cir. 2008) ("even *de minimis* force will violate the Fourth Amendment if the officer is not entitled to arrest or detain the suspect"). So we vacate the dismissal of Plaintiffs' § 1983 unlawful-seizure claim against the Deputies and remand for further proceedings consistent with this opinion.[4]

B.

We also conclude that clearly established law as of October 24, 2015, put the Deputies on notice that their conduct was unlawful. "The touchstone of qualified immunity is notice." *Moore*, 806 F.3d at 1046. "The violation of a constitutional right is clearly established if a reasonable official would understand that his conduct violates that right." *Id.* at 1046-47.

In *Moore*, decided on October 15, 2015, we held that "an officer may not conduct a *Terry*-like stop in the home in the absence of exigent circumstances," consent, or a warrant. *Id.* at 1047, 1054. Thus, binding precedent clearly established, at the time of the encounter on October 24, 2015, that a seizure or entry within the home without a

4. To the extent Plaintiffs contend they established an excessive-force claim even if exigent circumstances justified the seizure and entry, this is a "discrete claim," *Jackson*, 206 F.3d at 1171, that was not raised below, so we decline to address it on appeal.

warrant or exigent circumstances violates the Fourth Amendment's prohibition on unreasonable searches and seizures. And the parameters of the exigent-circumstances doctrine were well-established before then, including, as relevant here, that circumstances do not qualify as exigent unless "the police reasonably believe an emergency exists which calls for an immediate response to protect citizens from imminent danger." *Holloway*, 290 F.3d at 1337.

Here, no reasonable officer could believe that he or she "faced an emergency that justified acting without a warrant." *McNeely*, 569 U.S. at 149. Based on the factual allegations in the complaint, which we must accept as true, this was not a situation where it would be "difficult for an officer to determine how the relevant legal doctrine"—here exigent circumstances—would apply. *Mullenix v. Luna*, 577 U.S. , , 136 S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015) (quotation marks omitted). There are no facts alleged in the complaint indicating that, notwithstanding Harley's possession of a firearm, this was an "emergency situation[] involving endangerment to life." *Holloway*, 290 F.3d at 1337. Accordingly, qualified immunity is not appropriate at this stage, though the Deputies are free to raise the defense again in a motion for summary judgment.

V.

As for Plaintiffs' failure-to-train claim against Sheriff Craig, we affirm the dismissal of this claim. Supervisors cannot be held liable under § 1983 on the basis of vicarious liability. *Keith v. DeKalb Cty., Ga.*, 749 F.3d 1034, 1047 (11th Cir. 2014). "Instead, to hold a supervisor liable a

plaintiff must show that the supervisor either directly participated in the unconstitutional conduct or that a causal connection exists between the supervisor's actions and the alleged constitutional violation." *Id.* at 1047-48. A plaintiff may prove such a causal connection in several ways, including when the supervisor's policy or custom results in deliberate indifference to constitutional rights. *Id.* at 1048.

Plaintiffs contend that Sheriff Craig exhibited deliberate indifference to his constitutional rights by failing to institute adequate policies and training to govern arrest procedures and the use of force by his deputies. But even if the facts alleged show that the Deputies were inadequately trained, to establish the Sheriff's liability under § 1983, Plaintiffs needed to show that the Sheriff "knew of a need to train and/or supervise in a particular area and . . . made a deliberate choice not to take any action." *See Gold v. City of Miami*, 151 F.3d 1346, 1350-51 (11th Cir. 1998). Plaintiffs have not made this showing. They simply allege in conclusory fashion that the Sheriff's training policies were inadequate. But they do not offer any specifics of current training or whether the Sheriff was aware of any similar prior incidents, so we cannot infer that he was on notice that current training was inadequate. *See id.* Accordingly, Plaintiffs' allegations are insufficient to sustain a plausible claim against the Sheriff for failure to train under § 1983.

VI.

Finally, we consider whether the Deputies are entitled to official immunity under Georgia state law. Under

Georgia's doctrine of official immunity, state public officials are not personally liable for discretionary acts performed within the scope of their official authority unless "they act with actual malice or with actual intent to cause injury in the performance of their official functions." Ga. Const. art. I, § 2, ¶ IX(d); *Murphy v. Bajjani*, 282 Ga. 197, 647 S.E.2d 54, 60 (Ga. 2007). Thus, "[t]o overcome official immunity, the plaintiff must show that the officer had 'actual malice or an intent to injure.'" *Smith v. LePage*, 834 F.3d 1285, 1297 (11th Cir. 2016) (quoting *Cameron v. Lang*, 274 Ga. 122, 549 S.E.2d 341, 344 (Ga. 2001)).

Plaintiffs argue that they overcame official immunity because they alleged an intentional unjustified shooting. "In a police shooting case, [the official-immunity] analysis often comes down to whether the officer acted in self-defense." *Id.* If a suspect is shot in self-defense, then there is "no actual tortious intent to harm him." *Id.* (quoting *Kidd v. Coates*, 271 Ga. 33, 518 S.E.2d 124, 125 (Ga. 1999)). If, however, the suspect is shot "intentionally and without justification," then the officer "acted solely with the tortious actual intent to cause injury." *Id.*

Here, no deadly force against Harley was used until he opened fire on the Deputies. At that point, the Deputies' conduct was justified by self-defense and is, accordingly, shielded from tort liability by the doctrine of official immunity. *See Kidd*, 518 S.E.2d at 125-26.

Accepting the facts in the complaint as true, however, Plaintiffs plausibly alleged that the "less-than-lethal" shooting that preceded the firefight was intentional and

without justification by self-defense, for similar reasons as explained above with regard to the § 1983 unlawful-seizure claim. In particular, because Harley appears to have approached the fence as part of a ruse engineered by Deputy Curran and assisted by Deputy Kerger, so that Curran could get a better shot at Harley, the shooting cannot reasonably be described as defense of self or others. We therefore vacate and remand for further proceedings on this claim.

Nevertheless, it appears from the allegations that only Deputies Curran and Kerger are proper defendants to this claim. The complaint alleges that they, and no other deputies, acted in concert to commit the tortious conduct that foreseeably caused Harley's death. *See, e.g.*, *Madden v. Fulton Cty.*, 102 Ga. App. 19, 115 S.E.2d 406, 409 (Ga. Ct. App. 1960) ("persons acting in concert under certain situations may be liable for the acts of others"); Restatement (Second) of Torts § 876 (1979). The fact that the other deputies were present on the scene and marginally involved is not enough. *See Madden*, 115 S.E.2d at 409 ("If the participation is slight, there is no liability."). We therefore conclude that the remaining deputies (Higdon, Holloway, and Musgrave) are entitled to official immunity for this claim.

VII.

For the foregoing reasons, we vacate the dismissal of Plaintiffs' § 1983 unlawful-seizure claim against the Deputies and the state-law wrongful-death claim against Deputies Curran and Kerger. We affirm the

dismissal of Plaintiffs' § 1983 claims against Sheriff Craig and Troopers Curtis and Salcedo, as well as the state-law wrongful-death claim against Deputies Higdon, Holloway, and Musgrave. We remand this case for further proceedings consistent with this opinion.

VACATED AND REMANDED IN PART; AFFIRMED IN PART.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, FILED SEPTEMBER 27, 2018

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. 2:17-CV-00215-RWS

JANET TURNER O'KELLEY, INDIVIDUALLY
AND AS PERSONAL REPRESENTATIVE OF
THE ESTATE OF JOHN HARLEY TURNER;
AND JOHN ALLEN TURNER,

Plaintiffs,

v.

SHERIFF DONALD E. CRAIG, *et al.*,

Defendants.

September 27, 2018, Decided
September 27, 2018, Filed

ORDER

This case comes before the Court on Defendants Salcedo and Curtis' Motion to Dismiss [7] and Pickens

Sheriff's Office Defendants'[1] Motion to Dismiss [21]. After reviewing the record the Court enters the following order.

BACKGROUND

This case arises out of a series of events on October 24, 2015, which ultimately led to the shooting death of John Harley Turner ("Turner") by Pickens County Sheriff Deputies and Georgia State Patrol Officers. The following facts are taken from Plaintiffs' Complaint [1] and, for purposes of Defendants's Motions to Dismiss, are accepted as true. *Cooper v. Pate,* 378 U.S. 546, 546, 84 S. Ct. 1733, 12 L. Ed. 2d 1030 (1964).

On October 24, 2015, three Pickens County Sheriff Deputies, Frank Holloway, Keelie Kerger, and Bill Higdon, responded to a 911 call for "a completed domestic disturbance" from Kevin Moss. (Compl., Dkt. [1-1] ¶ 24.) Moss reported that he and some others had been accused of trespassing and threatened with bodily harm while hunting near Carver Mill Road. (*Id.* ¶ 22.) The deputies met Moss at the intersection of Carver Mill Road and Dean Mill Road and then proceeded to 1607 Carver Mill Road.[2] (*Id.* ¶ 25.)

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1. In addition to Sheriff Donald E. Craig, the Pickens Sheriff's Office Defendants are: (1) Sgt. Travis Palmer Curran; (2) Frank Gary Holloway; (3) Keelie Kerger; (4) Bill Higdon; and (5) Todd Musgrave.

2. Turner, his mother, Janet Turner O'Kelley, and her husband, Stan O'Kelley, live at 1607 Carver Mill Road. (Compl., Dkt. [1] ¶ 26.) The main house is occupied by Plaintiff Janet Turner

Appendix B

The Deputies arrived at the premises around 9:00 p.m. and met Mr. O'Kelley. (*Id.)* Mr. O'Kelley informed the deputies that Turner had threatened the hunters and that Turner was currently armed. (*Id.* ¶ 28.) Turner approached the deputies, armed with a pistol in a chest holster. (*Id.* ¶ 29.) The deputies ordered Turner to put down his gun. (*Id.* ¶ 30.) Turner asked the deputies why they were trespassing, and the deputies informed Turner that they were "cops." (*Id.)*

Shortly after, Deputy Todd Musgrave, Deputy Travis Curran, and two Georgia State Patrol Officers, Jonathan Salcedo, and Rodney Curtis, arrived at the premises. (*Id.* ¶ 31.) Curran had two shotguns, one that was loaded with beanbag rounds. (*Id.)* The two Georgia State Patrol officers were armed with rifles and took "sniper positions." (*Id.)* By this time, Turner had un-holstered his pistol and was carrying it above his head. (*Id.* ¶ 32.) The deputies continued to ask Turner to put down the gun and get on the ground. (*Id.)*

Ms. O'Kelley arrived home around 9:05 p.m. (*Id.* ¶ 34). Ms. O'Kelley told the deputies "that [Turner] would defend himself if [the deputies] opened fire." (*Id.)* The deputies sent Ms. O'Kelley back down the driveway and out of the way. (*Id.)*

O'Kelley and Stan O'Kelley, while Turner lived in a small house behind the main house. (*Id.)* Both houses are enclosed by a fence and gated. (*Id.)*

For the next half-hour, Turner (who had returned the pistol to his chest holster) and went back and forth with the deputies—Turner, on the one hand, wanting trespassers off his property, and the officers, on the other, wanting Turner to put the gun down. (*Id.* ¶ 35.) During the exchange, Turner did not verbally threaten or point his gun toward the deputies, nor did he leave the gated area. (*Id.* ¶¶ 37-38.) During the exchange, Turner was "distressed" and challenged the deputies to "go ahead and shoot [him]." (*Id.* ¶ 36.) The deputies "repeatedly reassured [Turner] that they were not going to shoot him." (*Id.)*

Around 9:12 p.m., Curran and Higdon moved to "get a better position" which involved crossing the fence to Turner's residence. (*Id.* ¶ 39.) The deputies moved into place while Turner was in his cabin getting water. (*Id.* ¶ 40.) When Turner came back outside, he told the deputies again that they were trespassers and that he wanted them to leave. (*Id.* ¶ 41.)

Deputy Kerger, who was unarmed, introduced herself to Turner and asked that he put down his gun and come speak with her. (*Id.* ¶ 42.) Turner responded that he did not have his gun, which was openly in his chest holster. (*Id.)* The deputies continued to tell Turner that they would not speak with him unless he took his gun out of the holster and put it on the ground. (*Id.)*

Turner, still armed, started to make his way toward the fence where Kerger was standing. (*Id.* ¶ 43.) Deputy Curran fired three beanbag rounds from his shotgun,

knocking Turner to the ground. (*Id.)* In response, Turner drew his pistol and fired. (*Id.* ¶ 43.) The other deputies returned fire. (*Id.* ¶ 44). Turner was shot and died at the scene. (*Id.)*

Plaintiffs Janet Turner O'Kelley, individually and as personal representative of the Estate of John Harley Turner, and John Allen Turner brought this suit against Sheriff Craig, Sergeant Curran, Deputy Holloway, Deputy Kerger, Deputy Higdon, Deputy Musgrave, Officer Slacedo, and Officer Curtis. Plaintiffs brings her claims under both federal and state law. In particular, Plaintiffs allege causes of action under 42 U.S.C. § 1983 for violations of Turner's constitutional rights under the Fourth and Fourteenth Amendments (Count I and IV).[3] Plaintiffs further allege a failure to train claim (Count

3. Plaintiffs entitle their first cause of action "Violations of Fourth and Fourteenth Amendments" without making reference to 42 U.S.C. § 1983. Because Plaintiffs are seeking monetary relief, the Court construes Count I as a claim under Section 1983. *See Livadas v. Bradshaw,* 512 U.S. 107, 132, 114 S. Ct. 2068, 129 L. Ed. 2d 93 (1994) (describing Section 1983's role as a vehicle through which individuals may seek redress when their federally protected rights have been violated). Furthermore, it is the Fourth Amendment that prohibits an unreasonable seizure of a person and governs claims of excessive force "in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen . . . ." *Id.* at 395. The arguments in Plaintiffs' briefs also rely solely on the Fourth Amendment. Thus, the Court assumes the Complaint's reference to the Fourteenth Amendment is limited to its incorporation of the Fourth Amendment into the states and their local governmental entities. Accordingly, the Court simply uses the term Fourth Amendment in this Order.

II). And, Plaintiffs raise claims under Georgia tort law for wrongful death (Count III). Finally, Plaintiffs assert that they are entitled to reasonable attorney's fees (Count V).[4] Defendants now move to dismiss each of those claims pursuant to Federal Rule of Civil Procedure 12(b)(6). (Mot. To Dismiss Defs.' Salcedo and Curtis, Dkt. [7]; Mot. To Dismiss Compl., Dkt. [21].) The Court sets out the legal standard governing Defendants' Motions to Dismiss before considering the motions on their merits.

DISCUSSION

I. Legal Standard

Federal Rule of Civil Procedure 8(a)(2) requires that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." While this pleading standard does not require "detailed factual allegations," "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550

4. Plaintiffs also contend, in one of their response briefs, that those officers who did not shoot Turner are liable for failing to intervene. (Pl.'s Br. In Opp. To Pickens Sheriff's Office Defs.' Pre-Answer Mots. To Dismiss, Dkt. [22] at 19-20.) This theory of liability is not alleged in the Complaint, and "[a] plaintiff cannot amend the complaint by arguments of counsel made in opposition to a motion to dismiss." *In re Androgel Antitrust Litig. (No. II),* 687 F. Supp. 2d 1371, 1381 (N.D. Ga. 2010) (quoting *Kuhn v. Thompson,* 304 F. Supp. 2d 1313, 1321 (M.D. Ala. 2004)). But, for the reasons laid out in this Order, the Court need not consider the merits of that argument, at any rate.

U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

To withstand a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly,* 550 U.S. at 570). A complaint is plausible on its face when the plaintiff pleads factual content necessary for the court to draw the reasonable inference that the defendant is liable for the conduct alleged. *Id.*

At the motion to dismiss stage, "all well-pleaded facts are accepted as true, and the reasonable inferences therefrom are construed in the light most favorable to the plaintiff." *Bryant v. Avado Brands, Inc.,* 187 F.3d 1271, 1273 n.1 (11th Cir. 1999). However, the same does not apply to legal conclusions set forth in the complaint. *Sinaltrainal v. Coca-Cola Co.,* 578 F.3d 1252, 1260 (11th Cir. 2009) (citing *Iqbal,* 556 U.S. at 678). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal,* 556 U.S. at 678. Furthermore, the court does not "accept as true a legal conclusion couched as a factual allegation." *Twombly,* 550 U.S. at 555.

II. Analysis

Defendants move to dismiss Plaintiffs' Complaint on three grounds. First, Defendants argue that the Pickens County Sheriff's Deputies and Georgia State Patrol Officers are entitled to qualified immunity for claims under 42 U.S.C. § 1983. Second, Defendants argue that Plaintiffs do not allege sufficient facts to hold Sheriff Craig liable for

failure to train. Finally, Defendants argue that Plaintiffs' state law claims against the Deputies and Officers are barred by the doctrine of official immunity. Plaintiffs oppose Defendants' motions, arguing that Defendants are not protected by official or qualified immunity for the conduct underlying Plaintiffs' state or federal claims respectively, and that the Complaint alleges sufficient facts to make out a plausible failure to train claim. Using the legal framework set forth above, the Court examines Plaintiffs' claims to determine whether the Complaint states a claim upon which relief may be granted.

A. Federal Claims Against the Pickens County Sheriff's Deputies and Georgia State Patrol Officers

"In order to prevail in a civil rights action under Section 1983, 'a plaintiff must make a prima facie showing of two elements: (1) that the act or omission deprived plaintiff of a right, privilege or immunity secured by the Constitution or laws of the United States, and (2) that the act or omission was done by a person acting under color of law.'" *Marshall Cty. Bd. of Educ. v. Marshall Cty. Gas Dist.,* 992 F.2d 1171, 1174 (11th Cir. 1993) (quoting *Bannum, Inc. v. City of Ft. Lauderdale,* 901 F.2d 989, 996-97 (11th Cir. 1990)).

However, the doctrine of qualified immunity "offers complete protection for government officials sued in their individual capacities if their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Vinyard v. Wilson,* 311 F.3d 1340, 1346 (11th Cir. 2002)

(quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). To claim qualified immunity, a defendant must first show he was performing a discretionary function. *Moreno v. Turner,* 572 F. App'x 852, 855 (11th Cir. 2014). "Once discretionary authority is established, the burden then shifts to the plaintiff to show that qualified immunity should not apply." *Edwards v. Shanley,* 666 F.3d 1289, 1294 (11th Cir. 2012) (quoting *Lewis v. City of W. Palm Beach,* 561 F.3d 1288, 1291 (11th Cir. 2009). A plaintiff demonstrates that qualified immunity does not apply by showing: "(1) the defendant violated a constitutional right, and (2) the right was clearly established at the time of the alleged violation." *Moreno,* 572 F. App'x at 855.

As a threshold matter, the Court concludes that Defendants were acting pursuant to their discretionary authority when the events at issue occurred. *See, e.g., Kesinger v. Herrington,* 381 F.3d 1243, 1248 (11th Cir. 2004) (officer's use of deadly force in altercation with defendant was clearly within the scope of his discretionary authority); Vinyard v. Wilson, 311 F.3d 1340, 1346 (11th Cir. 2002) (officer's arrest after investigating neighbor complaint was clearly within the scope of his discretionary authority). Thus, there are two remaining inquiries: whether Plaintiffs have alleged sufficient facts in the Complaint to illustrate a violation of a constitutional right and, if so, whether that right was clearly established at the time in question.

1. Fourth Amendment Violation

Plaintiffs contend that Turner's Fourth Amendment

rights were infringed based upon trespass and excessive force. It is a "basic principle of Fourth Amendment law" that searches and seizures inside a home without a warrant are presumptively unreasonable." *Bashir v. Rockdale Cty.*, 445 F.3d 1323, 1327 (11th Cir. 2006). This freedom from unreasonable searches and seizures includes "the right to be free from the use of excessive force in the course of an investigatory stop, or other 'seizure' of the person." *Kesinger*, 381 F.3d at 1248 (citing *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) and *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985)).

The test to determine whether a violation of the Fourth Amendment occurred is an objective one. The Court must ask whether the Defendants' conduct was objectively reasonable in light of the facts and circumstances confronting them, regardless of any underlying intent or motive. *Id.* Each officer's conduct "must be judged from the perspective of a reasonable officer on the scene, rather than with 20/20 vision of hindsight." *Id.* Applying this standard at the motion to dismiss stage, the Court finds that Plaintiffs have not set forth facts sufficient to establish that either the fatal shooting or the events leading up to it were objectively unreasonable under the circumstances.

Plaintiffs assert that because there was no warrant authorizing Defendants "to come onto the O'Kelley property or to seize [Turner] against his will within the curtilage of his home" the trespass of Deputies Curran and Higdon and the excessive force used by all Defendants

violated Turner's Fourth Amendment freedoms.[5] (Compl., Dkt. [1] ¶ 46.) Plaintiffs further allege that no legal exception applies to the lack of warrant. (*Id.* ¶ 48.) While it is undisputed that the Deputies did not have a warrant prior to the seizure, even a warrantless arrest in a home is permitted if the officer "had probable cause to make the arrest and either consent to enter or exigent circumstances demanding that the officer enter the home without a warrant." *Bashir*, 445 F.3d at 1328.

a. Probable Cause

"Probable cause exists when the facts and circumstances within the officer's knowledge, of which he or she has reasonably trustworthy information, would cause a prudent person to believe, under the circumstances, that the suspect has committed, is committing, or is about to commit an offense.'" *Kinzy v. Warren*, 633 F. App'x 705, 707 (11th Cir. 2016) (internal quotations omitted). For an officer to be shielded by qualified immunity, the officer does not need to have actual probable cause but rather arguable probable cause. *Id.* "Arguable probable cause is present where reasonable officers in the same circumstances and possessing the same knowledge as the defendant could have believed that probable cause existed." *Id.*

5. As the question of whether the premises surrounding the home constitutes curtilage is a question of fact, at this stage in the litigation it will be taken as true that Turner was seized within the curtilage of his home. *See United States v. Berrong,* 712 F.2d 1370, 1375 (11th Cir. 1983).

Appendix B

Defendants claim that there was arguable probable cause for both the trespass as well as the use of excessive force. Plaintiffs dispute this position for two reasons: first, that the facts alleged do not satisfy Georgia's terroristic threat statute, and second, that Turner's non-cooperation with the Deputies did not create probable cause for the seizure. The Court disagrees and finds that Defendants' conduct was supported by arguable probable cause.

As for Georgia's terroristic threat statute, that law, in relevant part, makes it a crime to threaten to "[c]ommit any crime of violence[.]" O.C.G.A. § 16-11-37(b)(1)(A). Defendants, here, were responding to a 911 call in which the caller specifically referenced a potential threat of bodily harm. (Compl., Dkt. [1-1] ¶ 22 (describing a 911 call in which a hunter told the operator that "a person on a neighboring property had yelled at [him and his companions] through the woods, accusing them of trespassing and threatening them with bodily harm if they did not leave"); *id* ¶ 24 (911 operator reported the call to Pickens County Sheriff's deputies and dispatched them to the scene); *id.* ¶ 25 (Deputies spoke to the caller before proceeding to Plaintiffs' residence)); *see also Poole v. State,* 326 Ga. App. 243, 756 S.E.2d 322, 327 (Ga. Ct. App. 2014) ("[T]he essential elements of terroristic threats and acts are: (1) a threat to commit any crime of violence (2) with the purpose of terrorizing another."). An officer is not required to prove every element of a crime prior to making an arrest, as this would "transform arresting officers into prosecutors." *Lee v. Ferraro,* 284 F.3d 1188, 1195 (11th Cir. 2002) (quoting *Scarbrough v. Myles,* 245 F.3d 1299, 1303 (11th Cir. 2001)). Thus, based on the

emergency phone call, Defendants had arguable probable cause to believe Turner violated the terroristic threat statute.

Likewise, Defendants had arguable probable cause to seize Turner based on his failure to cooperate and the attenuating circumstances. Indeed, as Defendants say, it is not Turner's non-cooperation alone that establishes probable cause, but rather the entirety of the circumstances. Lee, 284 F.3d at 1195 ("For probable cause to exist, . . . an arrest must be objectively reasonable based on the totality of the circumstances."). The Complaint alleges that Defendants were responding to a 911 call of a threat of bodily harm. (Compl., Dkt. [1] ¶ 22.) When Defendants arrived at the premises, Turner was armed and agitated. (*Id.* ¶ 29.) Ms. O'Kelley, who arrived shortly thereafter, informed the officers that Turner would "defend himself." (*Id.* ¶ 34.) When the officers tried to get Turner to put down the gun, he denied being armed. (*Id.* ¶ 30.) During the interaction, Turner became distressed, held the pistol above his head, and even challenged the officers to shoot him. (*Id.* ¶¶ 32, 36.) When Turner, who was still armed, made his way toward an unarmed deputy, a fellow deputy used non-lethal force to stop him. (*Id.* ¶ 43.) Only after Turner used deadly force, did Defendants respond with equal force. (*Id.* ¶¶ 43-44.) Therefore, Defendants had arguable probable cause for the seizure.

b. Exigent Circumstances

While probable cause itself does not validate a warrantless home seizure, the seizure may be justified

by exigent circumstances.[6] The exigent circumstance exception permits a warrantless entry "when there is compelling need for official action and no time to secure a warrant." *United States v. Holloway,* 290 F.3d 1331, 1337 (11th Cir. 2002). Plaintiffs allege there were no exigent circumstances present to support a warrantless seizure as the individual who made the call was already safe. However, the Eleventh Circuit has stated that "[t]he fact that no victims are found, or that the information ultimately proves to be false or inaccurate, does not render the police action any less lawful. . . . As long as the officers reasonably believe an emergency situation necessitates their warrantless search, whether through information provided by a 911 call or otherwise, such actions must be upheld as constitutional." *Id.* "The most urgent emergency situation excusing police compliance with the warrant requirement is, of course, the need to protect or preserve life." *Id.* at 1335 (citing *Mincey v. Arizona,* 437 U.S. 385, 392, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978)).

For the reasons previously stated in Part II.A.1.a., *supra,* exigent circumstances existed because it was reasonable for Defendants to believe that an armed suspect was inside the subject premises who posed a potential threat to those in the surrounding area or the officers. Accordingly, based on the facts alleged in

6. As stated above, consent may also justify a warrantless home seizure. However, as this case is before the Court on motions to dismiss, the Court concludes, for the purposes of this Order, that Defendants did not have consent to enter. The Complaint does not allege any express consent, and implied consent is insufficient. *See Bashir,* 445 F.3d at 1329.

the Complaint, Plaintiffs have not established that a constitutional right was violated.

2. Clearly Established

The Court also finds that Plaintiffs have failed to show the constitutional right was clearly established at the time of the incident. "The relevant dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz,* 533 U.S. 194, 202, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). There are two methods for determining whether the constitutional right was clearly established: (1) look to binding court decisions or (2) "ask whether the officer's conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to [the officer], notwithstanding the lack of fact-specific case law on point." *Moore v. Pederson,* 806 F.3d 1036, (11th Cir. 2015) (internal quotation and citation omitted). However, "[i]f case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." *Pickens v. Hollowell,* 59 F.3d 1203, 1206 (11th Cir. 1995) (quoting *Post v. City of Fort Lauderdale,* 7 F.3d 1552, 1557 (11th Cir. 1993).

Plaintiffs argue that the *Moore* decision—a case that "came down . . . nine days before the events at issue"—clearly established a constitutional violation in the case at hand. (Pl.'s Br. In Opp. To Pickens Sheriff's Office Defs.' Pre-Answer Mots. To Dismiss, Dkt. [22] at 14.) Plaintiffs

assert that the only distinction between *Moore* and the present case is that the seizure in *Moore* occurred while the plaintiff was inside his dwelling whereas Turner was outside. (*Id.)* However, the cases are factually different and "only factually specific analogous caselaw can clearly establish a constitutional violation." *Moore,* 806 F.3d at 1047. Unlike the case at hand where Defendants responded to a 911 call made in regard to violent threats, in *Moore,* the defendant responded to a neighbor complaint about an argument that "did not sound violent." *Id.* at 1040. Further, the plaintiff in *Moore* was not armed during the seizure, nor did anyone involved appear to be distressed. *Id.* Although Moore refused to provide identification when requested, he complied with the officer's instructions to turn around and put his hands behind his back. *Id.* By contrast, here, when the officers arrived at the premises, they were told Turner was armed, and when Turner appeared he was, in fact, visibly armed. Turner was also distressed and agitated, and he remained so during the seizure and refused to comply with the deputies' repeated requests to disarm.

While *Moore* clearly establishes that "an officer may not conduct a Terry-like stop in the home in the absence of exigent circumstances," *id.* at 1047, it is too dissimilar from the present case and, therefore, does not clearly establish a constitutional violation, *see* Part II.A.1.b., *supra.* Accordingly, Defendants' Motions to Dismiss as to Plaintiff's Section 1983 claims are **GRANTED**.

Appendix B

B. Failure to Train Claim Against Sheriff Craig

It is well settled in this Circuit that "supervisory officials are not liable under [Section] 1983 for the unconstitutional acts of their subordinates on the basis of respondeat superior or vicarious liability." *Keith v. Dekalb Cty.,* 749 F.3d 1034, 1047 (11th Cir. 2014) (quoting *Cottone v. Jenne,* 326 F.3d 1352, 1360 (11th Cir. 2003). There are no allegations that Sheriff Craig participated personally in the immediate events leading up to Turner's death, nor that he was present at the time in question. Rather, Plaintiffs base their Section1983 claim against Sheriff Craig on a failure to train the Pickens County Sheriff Deputies.[7]

To establish liability under Section 1983 based on the inadequacy of police training, a plaintiff must show that "the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Am. Fed'n of Labor & Cong. Of Indus. Orgs. v. City of Miami*, 637 F.3d 1178, 1188 (11th Cir. 2011) (quoting *City of Canton v. Harris*, 489 U.S. 378, 388, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989)) "Deliberate indifference can be established in two ways: by showing a widespread pattern of similar constitutional violations by untrained employees or by showing that the need for training was so obvious

7. At the outset, the Court notes that although Sheriff Craig had supervisory authority over the Pickens County Sheriff Deputies, because Plaintiffs have failed to state a Section 1983 claim against the Deputies, Plaintiffs' supervisory liability claim against Sheriff Craig also fails. Nonetheless, the Court proceeds to address Plaintiffs' claim on the merits.

that a . . . failure to train . . . employees would result in a constitutional violation." *Mingo v. City of Mobile*, 592 F. App'x 793, 799-800 (11th Cir. 2014), *cert denied*, 135 S. Ct. 2895, 192 L. Ed. 2d 926 (2015).

Here, the Complaint does not include sufficient facts about a history of abuse or widespread problems that would allow the Court to find that Sheriff Craig was put on notice regarding the need for more training. The Complaint contains only conclusory allegations about Sheriff Craig's failure to provide adequate training regarding "arrest procedures and the use of force." (Compl., Dkt. [1-1] ¶ 65.) Essentially, Plaintiff has simply stated a conclusion—that Defendants "failed to institute adequate policies and training to govern arrest procedures and the use of force, including the use of deadly force" — but has not provided sufficient facts from which the Court could draw that conclusion. Id. The Court cannot accept these unsupported allegations as a valid basis for a claim. See Oxford Asset Mgmt. v. Jaharis, 297 F.3d 1182, 1187-88 (11th Cir. 2002) (stating that "conclusory allegations, unwarranted deduction of facts[,] or legal conclusions masquerading as facts will not prevent dismissal"). Without a basis in specific facts, such assertions are not sufficient to show that the training was inadequate and that Sheriff Craig was on notice of any deficiency.[8] As a

8. Of course, there is an "obvious need to train [armed] police officers on the constitutional limitations on the use of deadly force." *Gold v. City of Miami,* 151 F.3d 1346, 1352 (11th Cir. 1998) (citing *City of Canton,* 489 U.S. at 390 n.10). But Plaintiff's Complaint still falls short. Mere notice of a need to train or supervise is not sufficient. Rather, a plaintiff must further establish that a final

result, the Complaint does not include facts from which the Court could conclude that Sheriff Craig has violated Section 1983 under a theory of inadequate training. Defendants' Motion to Dismiss as to Plaintiffs' failure to train claim is, therefore, **GRANTED**.

C. State Law Claims Against Pickens Sheriff's Office Defendants[9]

Defendants argue that Plaintiffs' state law claims against the Pickens Sheriff's Office Defendants are barred by official immunity. The state constitutional provision governing official immunity provides as follows:

> [A]ll officers or employees of the state or its departments and agencies may be subject to suit and may be liable for injuries and damages caused by the negligent performance of, or negligent failure to perform, their ministerial functions and may be liable for injuries and damages if they act with actual malice or with

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policymaker "made a deliberate choice not to take any action." *Id.* at 1350. The Complaint does not identify a specific decision made by Sheriff Craig resulting in a systemic failure to adequately train and supervise police officers.

9. Though not apparent from the face of the Complaint, Plaintiffs clarify in an opposition brief that they did not intend to assert any state law claims against the Georgia State Patrol Officers, Salcedo and Curtis. (Pls.' Br. In Opp. To The Georgia State Patrol Defs.' Pre-Answer Mots. To Dismiss, Dkt. [23] at 7.) Accordingly, this section pertains only to the individual Deputies of Pickens Sheriff's Office who responded to the incident.

> actual intent to cause injury in the performance of their official functions. Except as provided in this subparagraph, officers and employees of the state or its departments and agencies shall not be subject to suit or liability, and no judgment shall be entered against them, for the performance or nonperformance of their official functions.

Ga. Const. art. I, § 2, ¶ 9(d). The Supreme Court of Georgia has held that the term "official functions" refers to "any act performed within the officer's or employee's scope of authority, including both ministerial and discretionary acts." *Gilbert v. Richardson,* 264 Ga. 744, 452 S.E.2d 476, 483 (Ga. 1994). Accordingly, "[u]nder Georgia law, a public officer is not personally liable for a discretionary act unless the officer 'acted with actual malice or actual intent to cause injury.'" *Felio v. Hyatt,* 639 F. App'x. 604, 611 (11th Cir. 2016) (quoting *Valades v. Uslu,* 301 Ga. App. 885, 689 S.E.2d 338, 343 (Ga. Ct. App. 2009), *overruled on other grounds by Harrison v. McAfee,* 338 Ga. App. 393, 788 S.E.2d 872 (Ga. Ct. App. 2016)). As a threshold matter, the Court concludes that Defendants were acting within their discretionary authority during the events leading up to Turner's death. However, Plaintiffs have failed to show any actual malice or intent to injure on the part of Defendants under the applicable legal standards.

Both actual malice and actual intent to cause injury are demanding standards. *Felio,* 639 F. App'x at 611-12. "'[A]ctual malice' requires a deliberate intention to do wrong, and denotes express malice or malice in fact.

It does not include willful, wanton, or reckless conduct or implied malice. Thus, actual malice does not include conduct exhibiting a reckless disregard for human life." *Daley v. Clark,* 282 Ga. App. 235, 638 S.E.2d 376, 386 (Ga. Ct. App. 2006).

Defendants first argue that they enjoy official immunity for any negligence-based claim resulting from the performance of discretionary acts and reason that since a claim for wrongful death is based in negligence (as opposed to malice), Defendants are necessarily entitled to official immunity. *See Hoyt v. Cooks,* 672 F.3d 972, 981 (11th Cir. 2012). It is not so simple, however. Even in a claim like wrongful death, the Supreme Court of Georgia has stated that if an officer acts solely with actual intent to cause injury—that is, firing "intentionally and without justification"—then he or she would not be protected by official immunity. *Kidd v. Coates,* 271 Ga. 33, 518 S.E.2d 124, 125 (Ga. 1999); *see also Filio,* 639 F. App'x at 612.

Nonetheless, the Court agrees with Defendants that Plaintiffs have not alleged that Defendants' actions were performed "with actual malice or with actual intent to cause injury." Ga. Const. of 1983, Art. I, Sec. II, Par. IX(d). While Plaintiffs assert Defendants' acts were intentional and without justification (Compl., Dkt. [1] ¶ 69), actual intent to cause injury requires more than merely the "intent to do the act purportedly resulting in the claimed injury. This definition of intent contains aspects of malice, perhaps a wicked or evil motive." *Felio,* 639 F. App'x at 611.

The Complaint alleges that Defendants encountered Plaintiff after responding to a 911 call regarding a threat of bodily harm. (Compl., Dkt. [1] ¶ 22.) When Defendants arrived, Turner was armed and refused to comply with the deputies' multiple requests to disarm. (*Id.* ¶ 29, 30, 32.) When Turner, still armed, made his way towards an unarmed officer, a deputy fired beanbag rounds to which Turner responded by firing his pistol. (*Id.* ¶ 42-43.) Only then did Defendants apply deadly force by returning fire. (*Id.* ¶ 44.). The only inference to "malice" in the Complaint is a threadbare characterization of Defendants' conduct as "unlawful intentional acts." (*Id.* ¶ 69.) This conclusory allegation is insufficient to establish malice, and the mere intent to return fire is not enough. As a result, the Complaint does not allege any malice or intent to injure. Defendants are, therefore, entitled to official immunity; Defendants' Motion to Dismiss as to Plaintiffs' state law wrongful death claim is **GRANTED**.

D. Attorney's Fees

As none of the Plaintiffs' substantive causes of action remain in this litigation, Defendants' Motions to Dismiss as to Plaintiff's claim for attorney's fees are **GRANTED**.

CONCLUSION

For the foregoing reasons, Defendants' Motions to Dismiss Plaintiffs' Complaint [7, 21] are **GRANTED**. Plaintiffs' Complaint is **DISMISSED**. The Clerk is **DIRECTED** to close the case.

SO ORDERED, this 27th day of September, 2018.

/s/ Richard W. Story
RICHARD W. STORY
United States District Judge

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED OCTOBER 28, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-14512-EE

JANET TURNER O'KELLEY,

Individually and as Personal Representative
of the Estate of John Harley Turner,

JOHN ALLEN TURNER,

Plaintiffs-Appellants,

versus

SHERIFF DONALD E. CRAIG, SGT. TRAVIS PALMER CURRAN, a.k.a. Travis Lee Palmer, DEP. FRANK GARY HOLLOWAY, DEP. KEELIE KERGER, DEP. BILL HIGDON, DEP TODD MUSGRAVE, *et, al.*,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Appendix C

BEFORE: MARCUS, JORDAN, and ROSENBAUM Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ENTERED FOR THE COURT:

/s/_____
UNITED STATES CIRCUIT JUDGE

ORD-46