NO. 19-956

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

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated: March 2, 2020

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INTRODUCTION

On the night of October 24, 2015, the Defendant sheriff's deputies came to the rural Georgia home of John Harley Turner ("Harley")[1] to investigate a report that someone had made verbal threats to scare off some unwanted raccoon-hunters. When the deputies arrived, the incident was over and the hunters were safely far away. Harley met the deputies at his driveway gate and talked with them. He was armed with a pistol, but he did not threaten anyone with it. Instead, after discovering that his visitors were law enforcement and not trespassers, he tried to return to his cabin. But Defendants stopped him at gunpoint and detained him in his gated driveway for well over half an hour. During this lengthy standoff, Harley kept his pistol holstered and did not threaten the deputies. He even offered them a drink of water and told them he just wanted to go to bed. But he refused their requests to put his pistol on the ground, and he did not give them permission to enter his fenced yard.

At no relevant time did Defendants ever seek or obtain a warrant for Harley's arrest. Instead, apparently frustrated with his limited cooperation, they devised a military-style operation to take him down. Two Georgia State Patrol officers, armed with rifles, took up sniper positions. Then, when Harley went back to his cabin for water, two deputies crossed the fence in the dark and hid behind a hedge with twelve-gauge shotguns. Harley came back, his pistol holstered, carrying a water jug in one hand

[1] Plaintiffs' decedent was an adult, but is denominated by his given name here in order to distinguish him from Plaintiff John Allen Turner, and because that is how the Eleventh Circuit referred to him in the decision below.

and a flashlight in the other. An unarmed deputy approached the driveway gate and invited Harley to come and talk to her. It was a ruse. While Harley's attention was diverted, one of the hidden deputies fired his shotgun three times, dropping Harley to the ground with a "less lethal" shot-filled beanbag. Harley drew his weapon and fought back, and the officers shot him dead.

The District Court granted all Defendants' motions to dismiss on grounds of qualified immunity. On appeal to the Eleventh Circuit, Defendants **conceded** that Harley was within the curtilage of his home; that they lacked a warrant; and that their seizure of Harley therefore would not be justified unless they had consent or exigent circumstances. (Pet. App., 14a.) The Eleventh Circuit reversed on the ground that there was clearly no consent and that the facts alleged in the Complaint would not justify a reasonable officer in believing that exigent circumstances existed. *Id.*

Of the three questions presented in Defendants' Petition for Writ of Certiorari, not one asks this Court to decide any issue regarding the existence *vel non* of consent or exigent circumstances to support a warrantless seizure. Instead, all three questions address whether Eleventh Circuit precedent clearly established on October 24, 2015, that officers could not cross the boundary of a suspect's home to perform a stop on reasonable suspicion pursuant to *Terry* v. *Ohio*, 392 U.S. 1 (1964). But a ruling in Defendants' favor on that issue would not change the outcome of this case. The Eleventh Circuit did not decide whether Defendants had probable cause, whether they had reasonable suspicion, or which standard applied. Instead, the holding below was that Defendants could not prevail

on their Motion to Dismiss even if they met the higher standard of probable cause, because, on the allegations of the Complaint, they could not reasonably have believed that exigent circumstances necessitated a warrantless seizure.

In summary, the Petition presents questions that were not briefed or decided below, largely because Defendants conceded crucial issues. For this reason, and as demonstrated below, this Court should deny certiorari.

STATEMENT OF THE CASE

Because this case arises from a ruling on Defendants' Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the facts must be drawn solely from the allegations of the Complaint, and those allegations must be construed in favor of Plaintiffs as the non-moving parties. Unlike the Eleventh Circuit, Defendants disregard this standard. They ignore the allegations they do not like and tendentiously construe the rest in their own favor. They also fail to mention their own concessions that framed the issues for the Eleventh Circuit. Plaintiff respectfully directs the Court to the Eleventh Circuit's opinion, Pet. App. A, as a fairer summary of the case. In addition, and consistently with the Eleventh Circuit's summary, Plaintiffs provide the statement below with citations to the paragraphs of the Complaint. The Complaint itself is included as Appendix A to this brief (Resp. App. A).

I. Statement of Facts

On October 24, 2015, Pickens County Sheriff's Office Deputies Frank Gary Holloway, Keelie Kerger, and Bill Higdon responded to a 9-1-1 call for an already-completed incident involving allegations

that a resident had accused some hunters of trespassing and had scared them away from his property by threatening to harm them. (Resp. App. A, ¶¶ 22, 24.) The hunter who reported the incident had safely left the property, and he waited while the Deputies drove to meet him. (*Id.*, ¶¶ 23-25.) After getting the hunter's story, the Deputies drove to 1607 Carver Mill Road, Pickens County, Georgia. (*Id.*, ¶ 25.)[2]

Harley lived at 1607 Carver Mill Road in a small house behind the main house, which was occupied by Harley's mother, Janet Turner O'Kelley, and her husband, Stan O'Kelley. (*Id.*, ¶ 26.) The O'Kelley and Turner houses were enclosed in a fence with a closed gate that blocked the driveway. (*Id.*) When the Deputies arrived at about 9:00 p.m., they spoke briefly with Stan O'Kelley, who told them his stepson Harley was the one who had been reported, and that Harley was armed.[3] (*Id.*, ¶ 28.) There was no crime in progress at that time. (*Id.*, ¶ 27.)

As the officers spoke with Mr. O'Kelley, Harley approached the gate from the back house. (*Id.*, ¶ 29.) He was shirtless and armed with a pistol with a chest holster. (*Id.*) Harley was talking loudly about trespassing as he approached, but he did not point the gun at anyone and did not threaten anyone

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[2] Defendants state that the Deputies met the hunter on Carver Mill Road. Pet., p. 4. There is no such allegation in the Complaint, and Defendants do not cite any paragraph of the Complaint in support of their assertion. *Id.*

[3] Defendants inaccurately state that Mr. O'Kelley told the Deputies that Harley had threatened the hunters. Pet., p. 4. In fact, the Complaint does not state whether Mr. O'Kelley expressed any opinion at all about what had happened between Harley and the hunters, or whether he was even present for that encounter. Resp. App. A, ¶ 28.

with the gun. (*Id.*) He did not open the gate. (*Id.*) Shouting and with guns raised, the Deputies ordered Harley to put his hands up and put his gun down. (*Id.*, ¶ 30.) They did not identify themselves as law enforcement, and Harley's questions to them suggest that he thought they were trespassers. (*Id.* (alleging that Harley asked them, "Why are you trying to trespass?").)

At approximately that time Deputy Todd Musgrave arrived, followed immediately by Deputy Travis Curran. (*Id.*, ¶ 31.) Deputy Musgrave carried a shotgun. (*Id.*) Deputy Curran had two shotguns, one of which was loaded with "less lethal" beanbag rounds. (*Id.*) Two Georgia State Patrol officers, Jonathan Salcedo and Rodney Curtis, also arrived at about that time, armed with rifles, and took up sniper positions. (*Id.*)

At that point, Harley tried to terminate the encounter by walking back from the gate to his house. (*Id.*, ¶ 32.)[4] But rather than let him leave, the Deputies shouted at Harley to put the gun down and get on the ground. (*Id.*) Harley told them to just keep trespassers off his property, and tried to walk away again. (*Id.*, ¶ 33.) The Deputies, still pointing guns at his back, ordered him to come back to the fence. (*Id.*)

Around 9:05 p.m., Plaintiff Janet Turner O'Kelley arrived at the property. (*Id.*, ¶ 34.) She had

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[4] Defendants mischaracterize Harley's attempted exit in sinister terms, misleadingly asserting that Harley "unholstered the pistol and wielded it above his head." Pet., p. 4. But that is not what the Complaint alleges. According to the Complaint, the only time Harley raised the gun above his head was when he put his hands up and turned his back to the officers in an effort to disengage from them. (Doc. 1, ¶ 32.) In fact, the Complaint alleges over and over again that Harley did not threaten the officers with the gun. (*Id.*, ¶¶ 29, 37, 58.)

been away for the evening, volunteering at a local community theater. (*Id.*) Ms. O'Kelley saw that 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. (*Id.*) The deputies would not let Ms. O'Kelley talk to Harley, but sent her back down the driveway towards her vehicle. (*Id.*) They had previously sent Stan into a neighbor's house to get him out of the way. (*Id.*)

For approximately the next half-hour, the officers kept Harley there and attempted to get him to put his gun on the ground while Harley walked back and forth in the driveway, wearing his gun in its chest holster and arguing that he simply wanted the officers to keep trespassers away from his property, and he wished they all would leave so that he could go to bed. (*Id.*, ¶ 35.) Harley was distressed and perceived the Deputies as threatening him. (*Id.*, ¶ 36.) However, he never threatened or pointed the gun towards the Deputies, and he even offered them a drink of water. (*Id.*, ¶ 37.)

At no point did Harley open the gate or leave the area within the fence that surrounded the O'Kelley and Turner residences. (*Id.*, ¶ 38.) He remained within the curtilage of his dwelling at all relevant times. (*Id.*, ¶ 49.) At no point did any of the officers obtain a warrant, or even discuss getting a warrant. (*Id.*, ¶ 38.)

At about 9:12 p.m., Deputies Curran and Higdon indicated that they were going to go quietly around the side of the driveway to "try to get a better position" so they could take shots at Harley. (*Id.*, ¶ 39.) This required them to cross the fence and take cover in a second driveway, also on the O'Kelley property. (*Id.*) This driveway ran roughly parallel to

(and a few feet lower than) the one where Harley was standing. (*Id.*) The two driveways were separated by a hedge and a small embankment. (*Id.*)

Harley told the deputies that he was tired and wanted to go to bed, and that he was going to his cabin to get a drink of water. (*Id.*, ¶ 40.) This time, the officers did not stop him; true to his word, he returned from his cabin with a flashlight in one hand and a jug of water in the other. (*Id.*, ¶ 41.) He did not bring with him the SKS rifle that was under the bed in his cabin. (*Id.*) His pistol was holstered. (*Id.*) He pointed out to the officers that he was not the aggressor here, and told them that they were trespassing while he had never crossed the fence line. (*Id.*, ¶ 41.)

While Harley was getting his water jug, however, Curran and Higdon had crossed the fence and gotten into position in the lower driveway with their shotguns. (*Id.*, ¶ 40.) Curran had urged Deputy Kerger to draw Harley closer to the fence, which she did by approaching Harley unarmed and inviting him to come talk with her. (*Id.*, ¶ 42.) Deputy Musgrave covered Kerger during this operation. (*Id.*, ¶ 57.) The Deputies did this for the purpose of drawing Harley into a spot where Curran could get a good shot at him. (*Id.*, ¶ 58.)

When Harley approached the fence to talk, Curran fired three rounds from a twelve-gauge shotgun loaded with shot-filled beanbags, striking Harley with at least one round. (*Id.*, ¶ 43.) Harley returned fire, and the other deputies and GSP officers shot him dead. (*Id.*, ¶ 43-44.)

II. Statement of Proceedings Below

This action was brought by Harley's surviving parents, Janet Turner O'Kelley and John Allen Turner (collectively "Plaintiffs"). (Doc. 1.) In the Complaint, Plaintiffs allege: (1) claims under 42 U.S.C. § 1983 for the warrantless and unreasonable seizure and killing of John Harley Turner within the curtilage of his home by Defendants Curran, Higdon, Holloway, Musgrave, Kerger, Salcedo, and Curtis; (2) claims under 42 U.S.C. § 1983 against Sheriff Craig for failure to train his deputies; (3) claims under state law for the wrongful death of John Harley Turner; and (4) a claim for costs, including attorneys' fees, under 42 U.S.C. § 1988. (*Id.*, ¶¶ 45-77.)

In response to the Complaint, all of the Defendants filed motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) for alleged failure to state a claim upon which relief could be granted. (Doc. 7, Doc. 21.) In an Order dated September 27, 2018, the District Court granted these motions and dismissed the action in its entirety. (Pet. App. B.) Plaintiffs filed a timely Notice of Appeal on October 26, 2018. (Doc. 33.)

On July 16, 2019, the Eleventh Circuit entered its unanimous, unpublished, *per curiam* opinion affirming in part and reversing in part the judgment of the District Court. (Pet. App. A.) As the Eleventh Circuit noted, Defendants made important concessions that framed the issues presented on appeal.

> 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.

(Pet. App. A, p. 14a.) Thus, the Court of Appeals held that it could set aside the issue of whether probable cause existed:

> 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.

(*Id.* (emphasis in original).)

The Eleventh Circuit explained that the requirement of an imminent danger had long been clearly established, and cited its nearly two-decade-old decision in *United States v. Holloway*, 290 F.3d 1331 (2002), for the rule that "circumstances do not qualify as exigent [under the endangerment-to-life exception to the warrant requirement] unless 'the police reasonably believe an emergency exists which calls for an immediate response to protect citizens from imminent danger.'" (Pet. App. A, p. 19a.) On the facts alleged in the Complaint, the Eleventh Circuit held, no reasonable officer would believe this well-settled legal standard was met:

> 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 (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.

(*Id.*, pp. 19a-20a.)

Defendants filed a Petition for Rehearing, which the Eleventh Circuit denied without any of the judges in active service having requested a poll. (11th Cir. Case No. 18-14512, Doc. 8/6/2019 (Petition

for Rehearing); Doc. 10/28/2019 (denial). Defendants then filed a motion requesting that the Eleventh Circuit stay its mandate pending the filing and adjudication of a Petition for Writ of Certiorari in the United States Supreme Court. (11th Cir. Case No. 18-14512, Doc. 11/4/2019.) The Eleventh Circuit summarily denied that motion. (*Id.*, Doc. 11/18/2019.)

Defendants' Petition for Writ of Certiorari was docketed in this Court on January 30, 2020.

REASONS TO DENY THE PETITION

I. This is not a proper case in which to decide what precedents, other than this Court's precedents, may clearly establish the law for purposes of qualified immunity.

In their first question presented, Defendants ask this Court to grant certiorari to decide "[w]hether a panel decision decided nine days before the relevant conduct in question constitutes clearly established law to deprive government officers of qualified immunity." Pet., *i.* Defendants make a strained effort to link that question with the one noted by this Court in *D. C. v. Wesby*, 138 S. Ct. 577, 591 (2018), which was, "what precedents—other than [those of this Court]—qualify as controlling authority for purposes of qualified immunity." The question raised in *Wesby* is important, to be sure; but this is not a proper case in which to decide it, and Defendants do not even ask this Court to do so.

The precise issue noted in *Wesby* was not raised in either lower court, and the Eleventh Circuit's decision did not even mention its general circuit rule regarding the types of authority that may clearly establish the law. The distinct issue that

Petitioners attempt to raise — whether a circuit-court decision constitutes clearly established law after being on the books for nine days — is logically posterior to the question noted in *Wesby*, such that a decision on one would not necessarily resolve the other. Defendants cannot point to a mature circuit split on their lesser, timing-related issue, and even if they could, that issue was not raised or decided in either lower court. In fact, Defendants expressly conceded that the Eleventh Circuit precedent in question, *Moore v. Pederson*, 806 F.3d 1036, 1046 (11th Cir., Oct. 15, 2015), had created clearly established law. This Court should not grant certiorari on an issue that turns on a circuit court's use of its own precedent, without having the benefit of full adversarial briefing and an express decision on that issue in the circuit court itself. For these reasons, and as demonstrated below, certiorari should be denied as to the first question presented in Defendants' Petition.

A. Defendants' first question presented was waived below.

Defendants make no serious effort to show that the issues raised in their Petition were properly raised and ruled upon in the lower courts. That is because they were not. As Defendants have admitted in post-appeal briefing in the District Court, the very first time Defendants ever argued that a nine-day-old circuit precedent could not constitute clearly established law was in Defendants' Petition for Rehearing *En Banc* in the Eleventh Circuit. *See O'Kelley v. Craig*, U.S. Dist. Ct. N. D. Ga., Case No. 2:17-cv-00215-RWS, Doc. 56 (Defendants' Reply in Support of Motion to Stay Discovery Pending Certiorari, filed 02/25/20), pp. 4-7 (admitting that

the issue was not raised until Defendants' Petition for Rehearing *En Banc*). That is too late. The Eleventh Circuit deems arguments that were not made in an appellee's initial brief to be procedurally waived. *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1319 (11th Cir. 2012). And Defendants had every opportunity to raise this argument earlier, because Plaintiffs cited the *Pederson* decision as clearly established law in both the District Court and the Eleventh Circuit. *O'Kelley*, N. D. Ga., Case No. 2:17-cv-00215-RWS, Doc. 22, p. 14; 11th Cir., Case No. 18-14512-EE, Brief of Appellant filed Dec. 24, 2018, pp. 19-20. But Defendants did not use those opportunities to make the argument they are making now.

To the contrary, Defendants expressly conceded in their Eleventh Circuit brief that "*Moore* [*v. Pederson*] specifically created clearly established law in [the Eleventh] Circuit for the basic principle that 'an officer may not conduct a *Terry*-like stop in the home in the absence of exigent circumstances.'" 11th Cir., Case No. 18-14512-EE, Brief of Appellee filed March 13, 2019, p. 35. They further admitted that "[*Moore*] did this just 9 days before the actions in this case." *Id.* They even endorsed this ruling, stating, "Defendants have no qualm with this Court's holding in *Moore* [*v. Pederson*]. To them, it was the correct ruling, and set the proper analytical framework for disposition of the issues in this case." *Id.*, p. 36. By expressly inviting the Eleventh Circuit to rely on *Pederson* as clearly established law, Defendants affirmatively waived the issue they now attempt to raise as the first question presented in their Petition.

B. The Eleventh Circuit did not decide Defendants' first question presented.

"The Court does not ordinarily decide questions that were not passed on below." *City & Cty. of S.F. v. Sheehan*, 575 U.S. 600, 135 S. Ct. 1765, 1773 (2015). Because Defendants did not contest whether *Pederson* clearly established a rule against *Terry* stops in the home, the Eleventh Circuit had no occasion to decide that issue. But even if Defendants had briefed it, the issue still would have been inessential to the decision below.

The Eleventh Circuit rested its decision on two grounds. The first was Defendants' concession that they needed either consent or exigent circumstances for a warrantless seizure. Pet. App., p. 14a ("Because the Deputies lacked a warrant, the parties also agree that the Deputies needed consent or exigent circumstances."). The second was the circuit court's holding that the facts alleged in the Complaint would not support a reasonable belief that either consent or exigent circumstances existed. *Id.* ("Even assuming probable cause to arrest existed, no exception to the warrant requirement applied on the facts alleged."). This approach obviated the parties' dispute as to whether Defendants needed probable cause or mere reasonable suspicion. *Id.*

Defendants make much of the fact that the circuit court cited the *Pederson* decision. Indeed, it did; but only for the proposition that a warrantless search inside the home requires either consent or exigent circumstances. Pet. App., pp. 18a-19a. This is a well-settled point of law that Defendants did not dispute. *Id.*, p. 14a ("Because the Deputies lacked a warrant, the parties . . . agree that the Deputies needed consent or exigent circumstances."). Indeed,

the requirement of exigent circumstances has been clearly established at least since this Court's decision in *Payton v. New York*, 445 U.S. 573, 590, 100 S. Ct. 1371 (1980) ("Absent exigent circumstances, th[e] threshold [of the home] may not reasonably be crossed without a warrant."). Other Eleventh Circuit decisions also have reiterated this rule. *See, e.g., Feliciano v. City of Miami Beach*, 707 F.3d 1244, 1251 (11th Cir. 2013) ("A warrantless and nonconsensual entry into a person's home, and any resulting search or seizure, violates the Fourth Amendment unless it is supported by both probable cause and exigent circumstances.") (citing cases). Thus, the rule for which the Eleventh Circuit cited *Pederson* was much more than a nine-day-old rule. When the Eleventh Circuit's use of the *Pederson* decision is viewed in the full context of the decision below, it is clear that Defendants' first question presented is not really presented at all.

Indeed, even if the decision below had turned on *Pederson*'s holding that a *Terry* stop cannot be conducted in the suspect's home — which it did not — that holding still would have been more than nine days old on the date of the incident-in-suit. The Eleventh Circuit's decision in *Moore* first came down on September 16, 2015, which is thirty-eight days prior to Defendants' seizure of Turner on October 24, 2015. *Moore v. Pederson*, 801 F.3d 1325 (11th Cir., Sept. 16, 2015). Defendants ignore this first opinion, and refer to a substituted opinion that was entered about a month later; but the relevant holding did not change between the two opinions. *Compare Moore*, 806 F.3d at 1039 (Oct. 15, 2015) ("For these reasons, we hold today that, in the absence of exigent circumstances, the government may not conduct the equivalent of a *Terry* stop inside a person's home.").

with Moore, 801 F.3d at 1327 (Sept. 16, 2015) ("For this reason, we hold today that, in the absence of exigent circumstances, the government may not conduct the equivalent of a *Terry* stop inside a person's home.").

This ambiguity in the timing of the *Moore* decision, which Defendants conveniently do not mention, makes Defendants' Petition a poor vehicle for deciding the general question of how long a circuit-court opinion must be on the books before it becomes clearly established law. Indeed, Defendants themselves admit that a panel decision of a circuit court could, "perhaps, constitute clearly established law . . . twenty-one (21) days after the issuance of the panel decision . . .." Pet., p. 10. Given that admission, *Pederson*'s original opinion would have been clearly established law on the date of the incident-in-suit. The ambiguity of the *Pederson* decision's timing therefore is material by the terms of Defendants' own argument.

The fact that there are actually two *Pederson* opinions entered nearly a month apart makes it all but certain that a decision on Defendants' first question presented would be highly record-dependent and useless to most lower courts. Possibly a ruling from the Eleventh Circuit could have placed the issue on a different footing, but Defendants did not seek or obtain such a ruling. The resulting record cannot support a grant of certiorari.

C. There is no applicable split of authority.

Defendants do not and cannot point to any split of authority among the circuit courts or state courts of last resort regarding Defendants' first question presented. Instead of citing decisions that explicitly discuss the issue and reach squarely

conflicting conclusions, Defendants claim vaguely 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." Pet., p. 20. But the cases they cite do not substantiate that claim. Nor did Defendants cite those cases in the Eleventh Circuit, so as to give that court the opportunity to clear up any supposed "confusion." At any rate, Defendants do not claim, and cannot show, that this alleged "confusion" rises to the level of a direct and mature conflict of authority, so as to require this Court's intervention. At best, Defendants' cases show that their first question presented is still percolating in the circuit courts. It should continue to do so until a true split emerges.

Defendants just describe one case after another, and then leap without further analysis to their vague generalization that there is "mass confusion" among the circuit courts. But it is instructive to categorize the decisions on which Defendants rely. Of the eight decisions, five held that a circuit-court decision **more** than nine days old **was** sufficient to constitute clearly established law. *See Lintz v. Skipski*, 25 F.3d 304, 306 (6th Cir. 1994) (four months); *Arebaugh v. Dalton*, 730 F.2d 970, 971 (4th Cir. 1984) (twelve days); *Robinson v. Bibb*, 840 F.2d 349, 350 (6th Cir. 1988) (two years; some discussion in *dicta* of a four-day-old Supreme Court opinion); *Garcia by Garcia v. Miera*, 817 F.2d 650, 652 (10th Cir. 1987) (holding that eight months was sufficient, but also holding that the relevant point of law was clearly established even before that); *Doby v. Hickerson*, 120 F.3d 111 (8th Cir. 1987) (22 days held sufficient). Plainly, such decisions do not conflict with the Eleventh Circuit's decision here.

One case, *Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555, 1559 (5th Cir. 1984), was not a Section 1983 case at all, but was decided under the antitrust laws. In *Affiliated Capital*, the Fifth Circuit held that the mayor of Houston, Texas, had qualified immunity from suit under the Sherman Antitrust Act for official actions taken during a period when the scope of the "state action" exception to antitrust liability was uncertain. Antitrust law was in an unusual state of doctrinal flux at that time, as evidenced in part by this Court's split decision in *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978). Defendants do not appear to contend that any similar state of flux existed in Fourth Amendment law when they effected their warrantless seizure of Harley Turner. At any rate, a thirty-six-year-old antitrust case hardly counts as evidence that circuit courts today are confused about qualified-immunity law under Section 1983.

Defendants' next case, *Schlothauer v. Robinson*, 757 F.2d 196, 197 (8th Cir. 1985), involved a warrantless arrest that occurred in 1979, before this Court's 1980 decision in *Payton v. New York*, 445 U.S. 573, 586-90, 63 L. Ed. 2d 639, 100 S. Ct. 1371 (1980). The Eighth Circuit had presaged the rule in *Payton* by holding, in *United States v. Houle*, 603 F.2d 1297, 1300 (8th Cir. 1979), that a warrantless seizure in the home violated the Fourth Amendment absent exigent circumstances. Defendants are correct that the *Houle* decision was handed down eleven days prior to the arrest at issue in *Schlothauer*; but it was not timing alone that caused the Eighth Circuit in *Schlothauer* to hold that *Houle* did not count as clearly established law at the time of that arrest. As the *Houle* court noted,

this Court had "indicated that the question remain[ed] open," 603 F.2d at 1299, and had granted certiorari in *Payton* itself to resolve it, 603 F.2d at 1298, n.1 (referring to *Payton* under the name of its companion case, *Riddick v. New York*, 45 N.Y.2d 300, 408 N.Y.S.2d 395, 380 N.E.2d 224, Prob. juris. noted, 439 U.S. 1045, 99 S. Ct. 718, 58 L. Ed. 2d 703 (1978)). Thus, *Schlothauer*, like *Affiliated Capital*, is a case where a circuit court held that the governing law could not be deemed clearly established while this Court was still in the middle of developing it. That unusual situation does not exist here, of course, because the requirement of consent or exigent circumstances for a warrantless seizure in the home has been settled law since this Court decided *Payton*.

Bryan v. United States, 913 F.3d 356, 358 (3d Cir. 2019), is the only case cited by Defendants that actually grants qualified immunity on the grounds that a controlling authority was of too recent vintage for the relevant law-enforcement officers to become aware of it. But the underlying authority in *Bryan* was handed down just one or two days before the conduct at issue. *See* 913 F.3d at 363 ("For purposes of qualified immunity, a legal principle does not become 'clearly established' the day we announce a decision, or even one or two days later."). That holding does not conflict with the decision of the Eleventh Circuit here, which cited a panel decision that was either nine or thirty-eight days old at the time of the incident-in-suit (depending on which of the two *Pederson* opinions is deemed to have established the law).

Again, because Defendants did not raise the issue until their Petition for Rehearing, the decision of the Eleventh Circuit in this case does not lay down any categorical rule about how long a panel

decision must be on the books before it can constitute clearly established law. That being so, it does not conflict with any other decision that might set forth such a rule. And even if such a conflict existed — which it does not — it would not warrant this Court's intervention. The fact that the Eleventh Circuit panel designated its opinion in this case as unpublished means that future panels of that Court will not consider it binding precedent. *See* 11th Cir. Rule 36-2 (providing that unpublished opinions are not deemed precedential). If — unlike Defendants — a future litigant actually raises and briefs the issue, the Eleventh Circuit is at liberty to decide it without any need for this Court to get involved.

II. Defendants' second question also was not argued or decided below and is not a proper candidate for certiorari on this record.

Defendants' second question presented also relates to the timing of the *Moore* v. *Pederson* decision. For that reason, it is subject to most of the same objections as Defendants' first question. Defendants simply did not argue in the lower courts that the *Pederson* decision was too recent for them to have been subjectively aware of it at the time of the incident-in-suit. To the contrary, as demonstrated above, Defendants expressly agreed that *Pederson* constituted clearly established law. This concession squarely forecloses the questions that Defendants now ask this Court to review. Moreover, because Defendants did not dispute the issue of timing as such, the Eleventh Circuit did not address that issue in its decision. This Court should not grant certiorari on an issue that the lower courts did not decide. *Sheehan*, 575 U.S. 600, 135 S. Ct. 1765, 1773 (2015).

It is at least equally important that, as also demonstrated above, the *Pederson* decision's rule against *Terry* stops in the home was not material to the reasoning of the decision below. Even if Defendants reasonably could have believed that it was permissible to seize Turner on reasonable suspicion rather than probable cause, that belief would make no difference. The Eleventh Circuit's decision turned on the lack of exigent circumstances, not the lack of probable cause. *See* Pet. App., p. 14a ("While the parties dispute the existence of probable cause or reasonable suspicion, we need not address that issue. . .. Harley clearly did not consent, and no exigent circumstances existed here."). Accordingly, it does not matter whether Defendants were subjectively aware of the *Pederson* decision at the time of their warrantless seizure. Even if *Pederson* had never been decided, the Eleventh Circuit's holding that no exigent circumstances existed (and its further holding that this should not have been a difficult question for the officers to answer, Pet. App., p. 19a) would suffice to support the decision below.

Finally, the procedural posture of the case forecloses Defendants' effort to argue that they were subjectively unaware of the *Pederson* decision. This appeal arose from a ruling on Defendants' Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Thus, Defendants' alleged subjective unawareness of *Pederson* cannot be taken for granted just because they now attempt to assert it in a Petition for Writ of Certiorari. Instead, this Court, like the courts below, must credit Plaintiffs' allegation that Defendants knew there was no applicable exception to the warrant requirement. *See* Resp. App., p. 11a (¶ 47). At a minimum, the

allegations of the Complaint do not establish Defendants' subjective unawareness of *Pederson* as a matter of law. In fact, the allegations of the Complaint do not mention *Pederson* at all. Defendants' subjective unawareness of that decision, even if it were legally relevant, cannot be taken for granted in the current posture of the case.

III. Certiorari should not be granted to determine whether the Eleventh Circuit correctly applied its own circuit precedent.

In their third question presented, Defendants ask this Court to review the Eleventh Circuit's application of the circuit court's own decision in *Moore v. Pederson*. According to Defendants, the rule established in *Pederson* was expressed at so high a level of generality that a reasonable officer could not have known it would apply here. This argument fails.

To be precise, Defendants' objection is not that they were unable to determine from *Pederson* that a *Terry* stop in the boundaries of the home was unlawful. They admit that *Pederson* clearly established "the generalized proposition . . . that 'an officer may not conduct a *Terry*-like stop in the home in the absence of exigent circumstances, consent, or a warrant." Pet., p. 29. Nor is their argument based on a purported distinction between the home and the curtilage. Instead, their argument is that "the nonviolent, nonthreatening exchange in [*Pederson*] 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." *Id.* That is, they contend that *Pederson*'s admittedly categorical rule against *Terry* stops in the home did not put

them on notice that **exigent circumstances** were lacking for their warrantless seizure in this case.

This confused argument fails to recognize that the rule requiring exigent circumstances to support a warrantless arrest is distinct from the independent requirement of probable cause. Even if Defendants could evade the latter requirement by claiming to conduct a *Terry* stop in the home, they still would need to satisfy the former requirement by demonstrating exigent circumstances. And the Eleventh Circuit's *Pederson* decision simply did not establish any new rule, general or particular, regarding the existence *vel non* of exigent circumstances. Indeed, Defendants make no effort to argue that the Eleventh Circuit relied on some unique holding in *Pederson* to establish that exigent circumstances were lacking on the facts of this case. Nor could they. To the contrary, the Eleventh Circuit expressly held that "the parameters of the exigent-circumstances doctrine were well-established before [*Pederson*], 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." Pet. App., p. 19a (citing *United States v. Holloway*, 290 F.3d 1331 (2002)). Thus, on the dispositive issue in this case — the nature of the exigent-circumstances requirement — the Eleventh Circuit expressly held that *Pederson* was **not** some novel or exclusive source of clearly established law. Even if this Court were inclined to grant the writ of certiorari to second-guess a circuit court's reliance on intra-circuit precedent, it should not do so here, where the reliance complained of by Defendants did not occur.

CONCLUSION

For the foregoing reasons, certiorari should be denied as to all three of Defendants' questions presented.

Respectfully submitted,

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Dated: March 2, 2020

APPENDIX

APPENDIX A

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

GAINESVILLE DIVISION

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; SGT. TRAVIS PALMER CURRAN, a/k/a TRAVIS LEE PALMER; DEP. FRANK GARY HOLLOWAY; DEP. KEELIE KERGER; DEP. BILL HIGDON; DEP. TODD MUSGRAVE, OFC. JONATHAN SALCEDO, and OFC. RODNEY CURTIS,

Defendants.

Civil Action No.

Jury Trial Demanded

COMPLAINT FOR DAMAGES

Janet Turner O'Kelley, individually and as Personal Representative of the Estate of John Harley Turner, and John Allen Turner (collectively "Plaintiffs"), file this Complaint for Damages against Defendants Sheriff Donald E. Craig; Sgt. Travis Palmer Curran, a/k/a Travis Lee Palmer; Deputy Frank Gary Holloway; Deputy Keelie Kerger; Deputy Bill Higdon; Deputy Todd Musgrave; Officer

Jonathan Salcedo; and Officer Rodney Curtis ("Defendants"), showing this Honorable Court the following:

INTRODUCTION

1. This is a civil action asserting claims under state and federal law arising from the unlawful seizure, aggravated assault and battery, and wrongful death of John Harley Turner, caused by the willful and wrongful acts of the Defendants. Plaintiffs demand a jury trial and seek an award of economic, compensatory, and punitive damages, as well as an award of attorneys' fees and costs.

PARTIES, JURISDICTION AND VENUE

2. Plaintiff Janet Turner O'Kelley owns and resides at a property located at 1607 Carver Mill Road, Pickens County, Georgia. She is the mother of the late John Harley Turner, and the personal representative of his Estate.

3. Plaintiff John Allen Turner is a resident of Texas and is the father of the late John Harley Turner.

4. Defendant Sheriff Donald E. Craig resides in this judicial district and is subject to the personal jurisdiction of this Court. Defendant Craig may be served with Summons and a copy of the Complaint through the counsel retained by Pickens County to represent him: Mr. Phillip E. Friduss, Esq., Hall Booth Smith, P.C., 191 Peachtree St. NE, Suite 2900, Atlanta, GA 30303.

5. At all times relevant to this action, Defendant Craig was acting under color of state law and within the scope of his functions as the Sheriff of

Pickens County and chief policymaking official of the Pickens County Sheriff's Office ("PCSO").

6. Defendant Sgt. Travis Palmer Curran resides in this judicial district and is subject to the personal jurisdiction of this Court. Upon information and belief, he is also known as Travis Lee Palmer. Defendant Curran may be served with Summons and a copy of the Complaint through the counsel retained by Pickens County to represent him: Mr. Phillip E. Friduss, Esq., Hall Booth Smith, P.C., 191 Peachtree St. NE, Suite 2900, Atlanta, GA 30303.

7. At all times relevant to this action, Defendant Curran was acting under color of state law and within the scope of his functions as a law enforcement officer employed by the PCSO.

8. Defendant Frank Gary Holloway resides in this judicial district and is subject to the personal jurisdiction of this Court. Defendant Holloway may be served with Summons and a copy of the Complaint through the counsel retained by Pickens County to represent him: Mr. Phillip E. Friduss, Esq., Hall Booth Smith, P.C., 191 Peachtree St. NE, Suite 2900, Atlanta, GA 30303.

9. At all times relevant to this action, Defendant Holloway was acting under color of state law and within the scope of his functions as a law enforcement officer employed by the PCSO.

10. Defendant Keelie Kerger resides in this judicial district and is subject to the personal jurisdiction of this Court. Defendant Kerger may be served with Summons and a copy of the Complaint through the counsel retained by Pickens County to represent her: Mr. Phillip E. Friduss, Esq., Hall

Booth Smith, P.C., 191 Peachtree St. NE, Suite 2900, Atlanta, GA 30303.

11. At all times relevant to this action, Defendant Kerger was acting under color of state law and within the scope of her functions as a law enforcement officer employed by the PCSO.

12. Defendant Bill Higdon resides in this judicial district and is subject to the personal jurisdiction of this Court. Defendant Higdon may be served with Summons and a copy of the Complaint through the counsel retained by Pickens County to represent him: Mr. Phillip E. Friduss, Esq., Hall Booth Smith, P.C., 191 Peachtree St. NE, Suite 2900, Atlanta, GA 30303.

13. At all times relevant to this action, Defendant Higdon was acting under color of state law and within the scope of his functions as a law enforcement officer employed by the PCSO.

14. Defendant Todd Musgrave resides in this judicial district and is subject to the personal jurisdiction of this Court. Defendant Musgrave may be served with Summons and a copy of the Complaint through the counsel retained by Pickens County to represent him: Mr. Phillip E. Friduss, Esq., Hall Booth Smith, P.C., 191 Peachtree St. NE, Suite 2900, Atlanta, GA 30303.

15. At all times relevant to this action, Defendant Musgrave was acting under color of state law and within the scope of his functions as a law enforcement officer employed by the PCSO.

16. Defendant Jonathan Salcedo resides in this judicial district and is subject to the personal jurisdiction of this Court. Defendant Salcedo may be

served with Summons and a copy of the Complaint at his workplace: Georgia State Patrol Post 28, 3100 Camp Road, Jasper GA 30143.

17. At all times relevant to this action, Defendant Salcedo was acting under color of state law and within the scope of his functions as a law enforcement officer employed by the Georgia State Patrol ("GSP").

18. Defendant Rodney Curtis resides in this judicial district and is subject to the personal jurisdiction of this Court. Defendant Curtis may be served with Summons and a copy of the Complaint at his workplace: Georgia State Patrol Post 28, 3100 Camp Road, Jasper GA 30143.

19. At all times relevant to this action, Defendant Curtis was acting under color of state law and within the scope of his functions as a law enforcement officer employed by the Georgia State Patrol ("GSP").

20. This Court has jurisdiction of the subject matter pursuant to 28 U.S.C. § 1331, because this action arises under the laws of the United States, specifically 42 U.S.C. §§ 1983 and 1988.

21. Venue is proper in this district.

FACTUAL ALLEGATIONS

22. On October 24, 2015 at 8:28 p.m., a hunter named Kevin Moss called Pickens County 911. He reported that he and some others had been coon hunting on a property on Carver Mill Road, and 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. Moss claimed that he had not

trespassed on the neighbor's land. He specifically told the 911 operator that he did not know who allegedly had threatened him or whether the person was armed.

23. The 911 operator ascertained Moss's location and asked if he was safe to wait there for the officers. Moss said he would wait for them.

24. The 911 operator reported the incident to law enforcement as a completed domestic disturbance. Pickens County Sheriff's Deputies Frank Gary Holloway, Keelie Kerger, and Bill Higdon responded to the call. This was Kerger's first night on patrol. She and Holloway, her Field Training Officer, rode in Holloway's Explorer. Higdon drove separately in a patrol car.

25. The deputies first stopped to speak with Moss at the intersection of Carver Mill Road and Dean Mill Road, where he had waited for them to arrive. After talking with Moss, the deputies proceeded to the property at 1607 Carver Mill Road.

26. John Harley Turner ("Harley") lived at 1607 Carver Mill Road in a small house behind the main house, which is occupied by Harley's mother, Janet Turner O'Kelley, and her husband, Stan O'Kelley. The O'Kelley and Turner houses were enclosed in a fence with a closed gate that blocked the driveway.

27. At approximately 9:00 p.m., Holloway, Kerger, and Higdon arrived at 1607 Carver Mill Road. When they arrived at the property, there was no crime in progress.

28. Stan O'Kelley met Deputies Holloway, Kerger, and Higdon in the driveway outside the gate.

Stan explained to them that the man who had been reported was his stepson Harley, and that Harley was armed.

29. As the officers spoke with Mr. O'Kelley, Harley approached the gate from the back house. He was shirtless and armed with a pistol with a chest holster. Harley was talking loudly about trespassing as he approached, but he did not point the gun at anyone and did not threaten anyone with the gun. He did not open the gate.

30. Shouting and with guns raised, the deputies ordered Harley to put his hands up and put his gun down. The deputies did not immediately identify themselves as law enforcement officers. He replied, "I already put the gun down," and asked, "Why are you trying to trespass?" One of the male officers responded, "We're not trespassing; we're cops."

31. At approximately that time Deputy Todd Musgrave arrived, followed immediately by Deputy Travis Curran. Deputy Musgrave carried a shotgun. Deputy Curran had two shotguns, one of which was loaded with "less lethal" beanbag rounds. Two Georgia State Patrol officers, Jonathan Salcedo and Rodney Curtis, also arrived at about that time, armed with rifles. Salcedo and Curtis took up sniper positions.

32. Still within the gate, Harley began walking back to his house, with his hands above his head and his back to the deputies. He held the flashlight in one hand and the gun in the other. While Harley walked away, the deputies shouted at him to put the gun down and get on the ground.

33. Harley turned towards the officers and told them to just keep trespassers off his property. He again began walking away, but the deputies — still pointing guns at his back — ordered him to come back to the fence.

34. Around 9:05 p.m., Janet Turner O'Kelley arrived at the property. She had been away for the evening, volunteering at a local community theater. Ms. O'Kelley saw that 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 Ms. O'Kelley talk to Harley, but sent her back down the driveway towards her vehicle. They had previously sent Stan into a neighbor's house to get him out of the way.

35. Video and audio recordings show that a verbal back-and-forth ensued for approximately the next half-hour as officers attempted to get Harley to put his gun down while Harley walked back and forth, wearing his gun in a chest holster and arguing that he simply wanted the officers to keep trespassers away from his property, and he wished they all would leave so that he could go to bed.

36. Video and audio recordings show that Harley was distressed and perceived the deputies as threatening him. Several times, he challenged them to "go ahead and shoot me." The deputies repeatedly reassured him that they were not going to shoot him.

37. At no point did Harley verbally threaten or point the gun toward the deputies. In fact, at one point during the encounter, Harley offered to get the deputies a drink of water.

38. At no point did Harley open the gate or leave the area within the fence that surrounded the O'Kelley and Turner residences. At no point did officers obtain a warrant of any kind, and the video and audio recordings do not reflect that they ever even discussed getting a warrant.

39. In the middle of this verbal encounter, at about 9:12 p.m., Curran and Higdon indicated that they were going to go quietly around the side of the driveway to "try to get a better position" so they could take shots at Harley. This required them to cross the fence and take cover in a second driveway, also on the O'Kelley property. This driveway ran roughly parallel to (and a few feet lower than) the one where Harley was standing. The two driveways were separated by a hedge and a small embankment.

40. Harley told the deputies 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 gone, Curran and Higdon crossed the fence and got into position in the lower driveway with their shotguns.

41. Harley came back from his cabin with a flashlight in one hand and a jug of water in the other. He did not bring with him the SKS rifle that was under the bed in his cabin. His pistol was 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." He also stated that he was tired and would like to go to bed.

42. Curran urged Kerger to draw Harley closer to the fence. Kerger introduced herself to Harley and invited him to come to the fence to talk. Kerger told Harley that she did not have her gun. Harley responded positively and asked if she would like to talk. Kerger said that she could take a statement from Harley if he would put down his gun. Harley responded, "I already did," and Kerger replied, "It's on your chest, sir," indicating that the gun was in its holster. They continued talking, with the officers telling Harley that they would not talk with him until he took his gun out of its holster and put it on the ground.

43. 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 rounds from his less-lethal shotgun. At least one round struck Harley and knocked him down. Harley drew his pistol and returned fire.

44. The other deputies and State Patrol officers then opened fire, raining a hail of bullets on Harley and killing him. In the chaos, Deputy Kerger apparently shot Deputy Musgrave in the back, striking his bulletproof vest.

COUNT I: VIOLATION OF FOURTH AND FOURTEENTH AMENDMENTS

45. Plaintiff realleges and incorporates Paragraphs 1 through 44 as if fully set forth herein.

46. At all relevant times, Defendants Curran, Higdon, Holloway, Musgrave, Kerger, Salcedo, and Curtis (the "Illegal Seizure Defendants") knew that there was no warrant that authorized them to come onto the O'Kelley property

or to seize Harley against his will within the curtilage of his home.

47. All of the Illegal Seizure Defendants also knew that there was no applicable exception to the warrant requirement, and that they could not lawfully seize Harley within the curtilage of his home without going before a neutral magistrate and obtaining a proper warrant.

48. Despite knowing that there was no applicable warrant, and that no legal exception applied, all of the Illegal Seizure Defendants came onto the O'Kelley property and remained there for more than half an hour, despite having been told by Harley to leave.

49. Harley remained within the curtilage of his home at all relevant times.

50. Despite the absence of any applicable warrant or exception to the warrant requirement, all of the Illegal Seizure Defendants participated in the seizure of Harley within the curtilage of his home.

51. All of the Illegal Seizure Defendants knew that Harley was armed, and they knew or should have known that Harley likely would respond to being shot by drawing his gun and firing at Defendants. Among other things, they knew this because Ms. O'Kelley expressly told them that Harley would defend himself if they shot at him.

52. All of the Illegal Seizure Defendants knew or should have known that, if Harley drew his gun and fired at Defendants, at least some Defendants would fire at Harley with the intent to kill him.

53. Despite having all of the above knowledge, all of the Illegal Seizure Defendants participated and/or acquiesced in the unlawful use of force against Harley.

54. In particular, Deputies Curran and Higdon deliberately crossed the fence and trespassed on the O'Kelley property for the specific purpose of getting a better shot at Harley. All of the other Defendants knew that Curran and Higdon were going to take this unlawful action, and none of them made any effort to prevent it.

55. Deputy Curran deliberately orchestrated the false negotiation by Deputy Kerger so that he could get a better shot at Harley.

56. Deputy Kerger participated in the false negotiation to lure Harley out towards the fence where Curran could get a better shot at him.

57. Deputy Musgrave participated in the false negotiation by covering Deputy Kerger while she lured Harley out towards the fence.

58. All of these actions were for the purpose of helping Curran get a better shot at Harley, who was within the curtilage of his home, was not threatening anyone, was not under an arrest warrant, and had told Defendants that he wanted to go to bed. There was no lawful justification to use any force at all against Harley in these circumstances, much less to shoot him.

59. The wrongful act of Curran in firing his shotgun at Harley and striking him with a beanbag round in the course of an unlawful arrest constituted assault and battery under Georgia law, violated Harley's state and federal constitutional rights to be

free of unlawful seizure and excessive force, and deprived Harley of liberty and life without due process of law. All of the other Illegal Seizure Defendants acted in concert with Curran.

60. Because of the wrongful acts of all of the Illegal Seizure Defendants as alleged above, Harley suffered grave bodily injury and conscious pain and suffering, including but not limited to the terror of his approaching death.

61. The Estate of John Harley Turner is entitled to recover compensatory and punitive damages for the Illegal Seizure Defendants' wrongful acts described above.

COUNT II: FAILURE TO TRAIN (AGAINST SHERIFF CRAIG ONLY)

62. Plaintiffs reallege and incorporate Paragraphs 1 through 61 as if fully set forth herein.

63. Sheriff Donald E. Craig is the final decision-maker of the PCSO with regard to policies and training concerning all relevant subjects, including arrest procedures and the use of force.

64. At all relevant times, Sheriff Craig was subjectively aware that PCSO deputies needed adequate policies and training regarding arrest procedures and the use of force.

65. Sheriff Craig failed to institute adequate policies and training to govern arrest procedures and the use of force, including the use of deadly force, by PCSO deputies.

66. As a proximate result of Sheriff Craig's failure to institute adequate policies and training to govern arrest procedures and the use of force, PCSO

deputies improperly used excessive and unreasonable force against Harley Turner, foreseeably resulting in his death.

67. As a proximate result of Sheriff Craig's failure to institute adequate policies and training to govern arrest procedures and the use of force, PCSO deputies employed unreasonable and unlawful methods to seize Harley Turner at his home, violating his constitutional right to be free of unlawful seizure and depriving him of liberty and life without due process of law.

COUNT III: WRONGFUL DEATH

68. Plaintiffs reallege and incorporate Paragraphs 1 through 67 as if fully set forth herein.

69. The unlawful intentional acts of Defendants as described in Count I, *supra*, proximately caused the wrongful death of John Harley Turner.

70. Harley's surviving parents, Janet Turner O'Kelley and John Allen Turner, are entitled to recover the full value of Harley's life in an amount to be determined by a jury.

COUNT IV: VIOLATIONS OF CIVIL RIGHTS

71. Plaintiff realleges and incorporates Paragraphs 1 through 70 as if fully set forth herein.

72. Acting under color of state law, Defendants violated Harley's federal constitutional rights by seizing his person without probable cause or any lawful justification.

73. Because of this unlawful seizure, Harley's estate is entitled to compensatory, punitive,

and/or nominal damages against Defendants pursuant to 42 U.S.C. § 1983.

74. Acting under color of state law, Defendants violated Harley's federal constitutional rights by depriving him of liberty and life without due process of law.

75. Because of this unlawful deprivation, Harley's estate is entitled to compensatory and punitive damages against Defendants pursuant to 42 U.S.C. § 1983.

COUNT V: ATTORNEY FEES AND EXPENSES OF LITIGATION

76. Plaintiffs reallege and incorporate Paragraphs 1 through 75 as if fully set forth herein. Plaintiffs are entitled to an award of costs, including but not limited to reasonable attorneys' fees, pursuant to 42 U.S.C. § 1988.

WHEREFORE, Plaintiffs respectfully request the following relief:

(a) That the Court award Plaintiffs compensatory, punitive, and/or nominal damages against all Defendants in an amount to be determined by the enlightened conscience of an impartial jury;

(b) That the Court grant Plaintiffs their reasonable costs and attorney's fees in bringing this action in an amount to be determined at trial;

(d) That Plaintiffs be granted a trial by jury on all issues so triable; and

(e) That Plaintiffs be granted such other and further relief as this Court deems just and proper.

This 23rd day of October, 2017.

Respectfully submitted,

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