No. _____

In the
Supreme Court of the United States

JAIRO ACOSTA,
POLICE OFFICER FOR THE CITY OF LOS BANOS,
Petitioner,

v.

TAN LAM,
AS SUCCESSOR-IN-INTEREST TO DECEDENT SONNY LAM
(AKA SON TUNG LAM),
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is it plain error to admit evidence of a police officer's remote PTSD diagnosis to challenge the officer's credibility and prove he was more likely to have acted unreasonably in his use of force where there is no evidence the officer suffered from or experienced any symptoms of PTSD at the time of the incident?

2. If a suspect has stabbed an officer, been shot and wounded by the officer, dropped his weapon and continued to advance on the officer in a confined and unfamiliar space, all within a matter of seconds, does clearly established law put every reasonable officer on notice that the suspect no longer poses an immediate threat and prohibit the officer from firing a second shot to subdue the suspect?

PARTIES TO THE PROCEEDING

Petitioner and Defendant below is Jairo Acosta, Police Officer for the City of Los Banos, California.

Respondent and Plaintiff below is Tan Lam, as Successor-in-Interest to Decedent Sonny Lam (aka Son Tung Lam).

The City of Los Banos, a Municipal Corporation and Defendant below, is not a party to this Petition.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

All parties before the Court are individuals.

STATEMENT OF RELATED PROCEEDINGS

United States District Court for the Eastern District of California, Case Number 2:15-CV-531 MCE, entitled *Tan Lam v. City of Los Banos et al.* Judgment entered on August 16, 2018.

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Petitioner Jairo Acosta respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the United States Court of Appeals for the Ninth Circuit denying panel rehearing and rehearing *en banc* (Appendix E) is available at 2020 U.S. App. LEXIS 35895*.

The opinion of the United States Court of Appeals for the Ninth Circuit (Appendix A) is published and reported at 976 F.3d 986.

The memorandum and order of the United States District Court for the Eastern District of California granting in part plaintiff's motion for attorney fees and granting defendant's motion to correct the record on appeal is available at 2019 U.S. Dist. LEXIS 81428* [2019 WL 2103407].

The memorandum and order of the United States District Court for the Eastern District of California denying defendant's Rule 50(b) renewed motion for judgment as a matter of law, or, alternatively, for a new trial (Appendix B), is available at 2018 U.S. Dist. LEXIS 198059* [2018 WL 6068048].

The memorandum and order of the United States District Court for the Eastern District of California granting in part and denying in part defendants'

motion for summary judgment is available at 2017 U.S. Dist. LEXIS 48418* [2017 WL 1179136].

The judgment of the United States District Court for the Eastern District of California (Appendix C) entered in accordance with the jury verdict (Appendix D) is unreported.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its opinion on September 25, 2020. App. 1-60. It entered an order denying rehearing and rehearing *en banc* on November 16, 2020. App. 75-76. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Lam alleged that Officer Acosta violated his son's civil rights under the Fourth Amendment to the United States Constitution, which provides in pertinent part:

> The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

Lam brought this action under 42. U.S.C. § 1983, which provides:

> 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 . . . .

INTRODUCTION

This case involves two issues arising out of a jury's finding that Petitioner Jairo Acosta, a police officer for the City of Los Banos, used excessive force when he fatally shot plaintiff Tan Lam's son, Sonny Lam, after he responded to a call of an assault and matters rapidly escalated. Acosta encountered Sonny Lam in his bedroom. Sonny immediately became agitated, pushed Acosta out of the room, and then grabbed a pair of scissors and stabbed Acosta in the forearm. Acosta shot Sonny in the leg, wounding him. Acosta then backed down a narrow hallway in the home while he attempted to clear his weapon, which had jammed after the first shot. Sonny continued to advance on Acosta, wounded but now – according to the jury's special verdict – unarmed. As soon as Acosta cleared his weapon, he fired a second shot, whereupon Sonny fell to the ground and later died of his injuries. The entire sequence of events from the first to the second shot lasted only a few seconds.

The first issue involves the district court's admission of evidence that Acosta, an Iraq war veteran, had been diagnosed with post-traumatic stress disorder two-and-a-half years prior to this incident. There was no evidence Acosta suffered from PTSD or any symptoms thereof at or around the time of this incident. Nevertheless, plaintiff Lam used the evidence to urge the jury to speculate that Acosta did suffer from

PTSD on the day of this incident, that he brought his "demons" with him to Lam's home, and acted as one might expect someone suffering from PTSD to act; unreasonably and in violation of the Fourth Amendment.

In a split decision, the Court of Appeals for the Ninth Circuit disregarded the extreme prejudice resulting from this use of the evidence and held that Acosta's remote mental health diagnosis was properly admitted as relevant to his credibility, even in the absence of any nexus between that diagnosis and the incident at issue. This is a marked departure from the established precedent of numerous circuits. And, with an extremely high incidence of PTSD amongst law enforcement officers in this country, it creates a very real danger that those officers will now be subject to unprecedented attacks on their credibility unless or until they can prove they have engaged in treatment and/or fully recovered, even if their conditions or symptoms have long since subsided or disappeared. Not only does this turn the normal burdens of proof on their head, it may well discourage law enforcement officers from seeking professional help in the first instance, an undeniably undesirable result.

The second issue is one this Court has addressed repeatedly – particularly in cases coming out of the Ninth Circuit – which is that Circuit's insistence on defining clearly established rights at an extremely high level of generality when analyzing whether an officer is entitled to qualified immunity. The panel majority here defined the law as clearly established that an officer may not use lethal force on a suspect who does not pose

an immediate threat. This broad generalization is no more than a reiteration of the rule that an officer may not use excessive force. Analyzing qualified immunity at the requisite level of specificity, there was no clearly established law that would put every reasonable officer on notice that a suspect who, within a matter of seconds has stabbed the officer, been shot, and dropped his weapon but continues to advance on the officer in a confined space does not pose an immediate threat.

This Court should grant this petition on both issues presented, or alternatively, summarily reverse the decision of the Ninth Circuit as to those issues.

STATEMENT OF THE CASE

This is a civil rights action brought pursuant to 42 U.S.C. § 1983 in the United States District Court for the Eastern District of California, the jurisdiction of which was invoked pursuant to 28 U.S.C. § 1331 (general federal question jurisdiction), 28 U.S.C. § 1343 (civil rights jurisdiction), and 28 U.S.C. § 1367 (supplemental jurisdiction).

A. The Incident

In September of 2013, Officer Jairo Acosta responded to a call of an assault at the residence of Respondent Tan Lam. ER 165, 187. When Acosta arrived, Lam told him his son had hit him, and had "lost his mind." ER 188, 235. Lam led Acosta into the home through the garage, which opened into a laundry room, which in turn opened into a hallway with Sonny's bedroom immediately on the right. ER 165-166, 402.

Acosta opened the door to Sonny's bedroom, whereupon Sonny immediately started yelling at Acosta to get out. ER 164, 167, 190, 234. Matters quickly escalated. Lam testified Acosta grabbed Sonny by the shoulder to escort him out of the bedroom, and "challenged" Sonny to "beat me, beat me." ER 235-236. Sonny shouted "no, no, no," made punching motions with his hands, and then pushed Acosta towards the door, forcing both Acosta and Lam out into the hallway. ER 167, 169, 171, 192, 236-239, 242, 248. Sonny then turned and grabbed a pair of scissors from his desk drawer, prompting Acosta to draw his weapon. ER 193-195. Sonny stabbed Acosta in the left forearm with the scissors, and Acosta responded by shooting Sonny in the leg. ER 172-173, 184-186, 196, 406, 407.The bullet went through Sonny's calf and into the floor of Sonny's bedroom. ER 107-108, 110, 214-215, 412, 413. Lam ran up from behind Acosta, and Acosta told him to go back, that Sonny had a knife.

Immediately after the first shot, Acosta's gun jammed. ER 196-199, 205. He backed down the narrow hallway to where it made an L-turn as he attempted to clear his weapon using a "tap, rack and roll" technique. *Id.* Lam was somewhere behind him. Sonny, undeterred by the first shot, continued to advance on Acosta in the narrow hallway, although he no longer had the scissors.[1] ER 12, 109-111, 120-121, 175, 417-

[1] Two other officers who arrived at the scene testified the scissors were found under Sonny's legs where he fell, and then moved out of reach as they secured the scene. ER 99-100, 146-148, 151-152, 157-158. Another officer testified she did not see any scissors as she passed Sonny and Acosta in the hallway, and Lam testified he

418. As soon as Acosta cleared his weapon, he fired a second time, striking Sonny in the abdomen. ER 199, 203a, 205. Sonny fell to the floor at the end of the hallway, roughly ten feet from his bedroom, and later died of his injuries. ER 109-11, 180, 201, 402-405, 417-418. The entire sequence of events following the first shot occurred in one continuous motion, within a matter of seconds. ER 200.

B. District Court Proceedings

Lam brought an action against the City of Los Banos and Acosta. He alleged causes of action against Acosta under 42 U.S.C. § 1983 for violations of Sonny's Fourth Amendment right to be free from excessive force, and Lam's Fourteenth Amendment right to familial relations. He also alleged various state law claims against Acosta, including a cause of action for wrongful death/negligence. Finally, he alleged a *Monell* claim against the City under 42 U.S.C. § 1983 for unconstitutional customs or policies. The district court granted summary judgment for the City but found triable issues of fact precluded summary adjudication for Acosta on Lam's Fourth and Fourteenth Amendment claims, his state law negligence claims, and Acosta's defense of qualified immunity.

Acosta, an Iraq war veteran, brought a motion *in limine* to exclude as irrelevant and unduly prejudicial evidence that in 2011, two and a half years prior to this

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did not see Sonny holding scissors when he ran up from behind Acosta after the first shot to ask what happened. ER 96, 243. A jury found Sonny did not have scissors as he advanced on Acosta after the first shot. ER 12.

incident, he had been diagnosed by a Veteran's Affairs ("VA") psychologist with post-traumatic stress disorder (PTSD). There was no evidence he suffered from PTSD or any symptoms thereof at or even around the time of this incident. Acosta also sought to exclude as without foundation and inviting speculation expert opinion testimony that Acosta's 2011 PTSD diagnosis may have affected his decision-making during the incident. He also objected to the expert's opinions as improper character evidence under Fed. R. Ev. 404 and 406. Lam argued Acosta's diagnosis was relevant to whether he acted reasonably on the date of the incident; whether he "perceived the incident appropriately" and whether he "over-reacted."

Although the district court found "at this point in time there have been no facts . . . that would indicate that [Acosta's PTSD diagnosis] would be relevant to what occurred at the time of the shooting" it denied the motion *in limine*, without prejudice. ER 19-20.

The jury heard evidence that in February of 2011, Acosta met with VA nurse practitioner Mary Jimenez and reported he had been experiencing headaches, vision problems, sensitivity to noise, poor concentration, and forgetfulness. ER 297-299, 340-341. He also reported difficulty making decisions, irritability, poor frustration tolerance, feeling easily overwhelmed and/or angered, trouble sleeping, anxiety, and depression. ER 342-344. He reported these symptoms had interfered "severely" with his social life, marriage, and work in the past 30 days. ER 343. In June of 2011, Acosta met with VA psychologist Dr. Shuman and reported similar symptoms: difficulty

falling and staying asleep, irritability, outbursts of anger, difficulty concentrating, short term memory problems, hypervigilance partly exacerbated by his job as a police officer, and an exaggerated startle response to loud noises. ER 285. Dr. Shuman diagnosed Acosta with "prolonged" PTSD, meaning it had lasted for more than 90 days. ER 283. Dr. Shuman testified potential triggers for Acosta's PTSD could include clearing houses and drawing his weapon, but he emphasized that did not mean Acosta experienced symptoms every time he engaged in these activities, and he had no information as to how often this may actually have occurred. ER 284, 290. Dr. Shuman saw no reason to contact Acosta's employer concerning his diagnosis and did not advise Acosta to do so. ER 291.

Dr. Kris Mohandie, a clinical psychologist who never met or examined Acosta, offered expert testimony that an officer with a prior diagnosis of PTSD could be easily provoked and may not be able to respond flexibly or deescalate tense situations, or might overreact to stressors in the field. ER 307, 321-322. He opined Acosta should have reported his diagnosis to the City as something that could keep him from doing his job in a safe or effective manner (although Dr. Shuman, who actually examined Acosta, did not share this opinion). ER 291, 323, 332. Dr. Mohandie suggested that two incidents in Acosta's personnel file, where he was disciplined for being discourteous and for damaging a door, demonstrated behavior consistent with symptoms of PTSD. ER 314-318, 327-330. He also opined that without treatment, prolonged PTSD symptoms are "likely to continue," but he had *no opinion* as to whether Acosta actually

suffered from PTSD or was fit for duty at the time of this incident. ER 305, 307, 322.

Following the close of evidence Acosta moved for judgment as a matter of law under Fed. R. Civ. P. 50(a). Again, he raised the defense of qualified immunity. The district court denied the motion. The jury returned a verdict in Lam's favor on the Fourth and Fourteenth Amendment claims, as well as the state law negligence claims. App. 68-71. It found Sonny contributorily negligent for his own injuries and apportioned fault at 30% to Sonny and 70% to Acosta. App. 72. In response to special interrogatories, the jury found Sonny had stabbed Acosta with scissors, that Acosta retreated after the first shot, and that Sonny did not "approach Officer Acosta with scissors" before Acosta fired the second, fatal shot. App. 73-74. The district court entered judgment in accord with the jury's verdict. App. 67.

Acosta renewed his motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b). He argued his use of force was reasonable as a matter of law, that he lacked the requisite "purpose to harm" for a Fourteenth Amendment violation, that he was entitled to qualified immunity in any event, and that the evidence was insufficient to support the jury's finding of negligence. Alternatively, he argued the jury's verdict should be set aside as against the clear weight of the evidence, and a new trial granted under Rule 59. The district court denied the motion. App. 61-66.

C. Ninth Circuit Opinion – Split Decision

The Ninth Circuit, in a divided opinion, affirmed the district court's denial of Acosta's Rule 50(b) motion and its entry of judgment on the Fourth Amendment and state law negligence claims, but reversed as to the Fourteenth Amendment claim. The majority concluded sufficient evidence supported the jury's special finding that Sonny did not have scissors as he approached Acosta after the first shot, and therefore the jury could properly conclude Acosta's use of deadly force when he fired his second shot was unreasonable. App. 14-18. The majority also concluded Acosta was not entitled to qualified immunity because the law was clearly established that an officer may not use deadly force on a suspect who does not pose an immediate threat, even if that suspect was previously armed and aggressive. App. 18-32.

Because Acosta did not renew his objections to the PTSD evidence following the district court's denial of his motion *in limine* without prejudice, the Ninth Circuit reviewed the admission of that evidence for plain error. App. 37-39. The majority found the evidence was relevant to the jury's assessment of Acosta's credibility, and whether he accurately perceived or recalled the incident. App. 39-41.

Judge Bennett, dissenting, opined that: (1) Acosta was entitled to qualified immunity on the Fourth Amendment claim, and (2) the admission of the PTSD evidence constituted plain error requiring a new trial. App. 43-44. He agreed with the majority's reversal of Lam's Fourteenth Amendment claim. App. 44, n. 1.

REASONS FOR GRANTING THE WRIT

I.

Where there is no evidence an officer suffers from PTSD or any symptoms thereof at the time of the incident in question, it is plain error to admit evidence of a remote PTSD diagnosis to attack the officer's credibility and prove he acted unreasonably in his use of force.

The incidence of PTSD amongst law enforcement far exceeds that of the population at large. Studies cited by *Amici Curiae* below indicate that whereas 6.8% of Americans will suffer from PTSD at some point in their lives, that number rises to 35% amongst law enforcement officers. National Institute of Mental Health ("NIH"), *Post Traumatic Stress Disorder (PTSD)* (2017), at https://www.nimh.nih.gov/health/statitics/post-traumatic-stress-disorder-ptsd.shtml; Tammy L. Austin-Ketch, PhD., FNP, BC, FAANP et al., *Addictions and the Criminal Justice System, What Happens on the Other Side? Post-Traumatic Stress Symptoms and Cortisol Measures in a Police Cohort*, 23 J. OF ADDICTIONS NURSING 22, 24-29. PTSD can manifest itself in a wide variety of symptoms, which will differ depending on the individual. Arieh Shalev, M.D. et al., *Post-Traumatic Stress Disorder*, NEW ENG. J. MED. 2459, 2460-2461 (2017). The symptoms of PTSD are not only varied, but their severity can "fluctuate[] over time." *Id.* at 2462. Significantly, numerous studies indicate that a PTSD diagnosis is not static, and in many cases, can resolve itself. Patcho Santiago, M.D. et al., *A Systematic Review of PTSD Prevalence and Trajectories in DSM-5 Defined Trauma*

Exposed Populations: Intentional and Non-Intentional Traumatic Events, 8 PLOS ONE 4, (2013) [doi:10.1371/journal.pone.0059236]; Nexhmedin Morina et al., *Remission from Post-Traumatic Stress Disorder in Adults: A Systematic Review and Meta-Analysis of Long Term Outcome Studies*, 34 CLINICAL PSYCHOL. REV. 249, 251 (2014); Zahava Solomon Ph.D. et al., *Trajectories of PTSD: A 20-Year Longitudinal Study*, 163 AM. J. PSYCHIATRY 659, 661-663 (2006).

The significance of a published opinion holding that a remote PTSD diagnosis is relevant and admissible to challenge a law enforcement officer's credibility, in the absence of any evidence that the officer continued to suffer from PTSD or any symptoms thereof at or around the time of the incident in question, cannot be overstated. Is the credibility of up to 35% of this nation's law enforcement officers automatically subject to attack at any given time? If so, what does that mean for public confidence in those who are sworn to protect and serve? Will officers be deterred from seeking treatment, knowing that a diagnosis could be used against them years into the future? For those who do seek treatment and obtain a diagnosis, what is required of them to avoid an attack on their credibility years later, even where their symptoms have long since subsided or disappeared? Do they carry an affirmative burden of demonstrating "full recovery" to avoid having their credibility subject to attack? Or should the burden more properly be on the party challenging the officer's credibility to demonstrate that a remote PTSD diagnosis has some non-speculative nexus to the incident in question? The answers to these questions

have nation-wide implications for both law enforcement officers and the general public.

A. The majority opinion represents a marked departure from the decisions of other circuits, none of which have held a witness' mental health issues may be used to impeach their credibility in the absence of evidence the witness suffered from the condition at or around the time of the incident in question.

The majority concluded that Acosta's 2011 PTSD diagnosis was relevant to "whether Acosta testified credibly about the events that unfolded, and whether his recollection could be challenged." App. 39. Citing cases holding that evidence of a witness' "psychological history" may be admissible as relevant to issues of credibility, the majority found Acosta's PTSD diagnosis relevant to "his ability to accurately perceive and recall the incident in question." App. 40. The majority referenced Acosta's self-reported symptom of "forgetfulness" and Dr. Shuman's testimony that clearing houses or drawing his weapon could trigger certain PTSD symptoms such as "'intense psychological distress' and 'hypervigilance.'" App. 40. It also pointed to Dr. Mohandie's speculative testimony that someone suffering from PTSD could lack flexibility and overreact in stressful situations, and that the symptoms associated with "prolonged PTSD" are likely to continue if not treated. App. 40. "To the extent this testimony indicated that Acosta's PTSD *may have* caused him to misperceive reality and consequently overreact to certain situations, it was probative of his

credibility." App. 40-41 (emphasis added). The majority dismissed any concerns over the lack of any evidence that Acosta actually suffered from PTSD at or around the time of the incident, ostensibly "joining" its sister circuits that have held admissible even more remote mental health diagnoses. App. 41.

It is true that there are circumstances under which a witness' mental health issues may be relevant to impeach their credibility. The authorities cited by the majority support this broad proposition. But what those authorities do *not* suggest, as noted by Judge Bennett in his dissent (App. 57-58, n. 10), is that a remote mental health diagnosis is per se relevant and admissible where, as here, there is absolutely no evidence that the condition is ongoing or present at the time of the incident in question.

In *United States v. Love*, 329 F.3d 981 (8th Cir. 2003) the court held the district court violated a criminal defendant's right to cross-examination under the confrontation clause when it excluded evidence of a key witness' diagnosis of short- and long-term memory impairment made six years prior. The court enumerated the factors that must be considered in assessing the relevance of a witness' mental health issues: "1) the nature of the psychological problems; 2) *whether the witness suffered from the condition at the time of the events to which the witness will testify*; [and] 3) the temporal recency or remoteness of the condition." *Love*, 329 F.3d at 984 (emphasis added); *see also United States v. Sasso*, 59 F.3d 341, 347-348 (2d Cir. 1995). In *Love*, the court noted the witness "*has suffered* from this condition since at least 1996" and therefore found

the temporal remoteness of his diagnosis did not "eclipse" its relevance or the defendant's constitutional rights. *Id.* at 985 (emphasis added).

In *United States v. Smith*, 77 F.3d 511 (D.C. Cir. 1996), the court held that the district court erred in not reviewing a witness' medical records before excluding evidence of his mental history, which included hospitalization for chronic depression. *Id.* at 516. The court recognized that a witness' mental health may be relevant and admissible impeachment evidence if "it may reasonably cast doubt on the ability or willingness of a witness to tell the truth." *Id.* The court held the district court should have reviewed the records to determine their relevance, as they "might have indicated a relevant, *ongoing* problem . . . ." *Id.* at 517 (emphasis added).

Even prior precedent from the Ninth Circuit has recognized the need for a nexus between a witness' mental health issues and the events as to which they are to testify. In *United States v. Antone*, 981 F.2d 1059, 1061-1062 (9th Cir. 1992) the court upheld the exclusion of mental health records where there was no evidence the witness suffered from a mental illness bearing on her credibility "shortly before or during the period in which the events to which she testified occurred." And in *United States v. Kohring*, 637 F.3d 895, 910 (9th Cir. 2011) the court recognized that "'federal courts appear to have found mental instability relevant to credibility only where, *during the time-frame of the events testified to*, the witness exhibited a pronounced disposition to lie or hallucinate, or suffered

from a severe illness . . . that dramatically impaired her ability to perceive and tell the truth.' [Citation.]."

In *United States v. Butt*, 955 F.2d 77 (1st Cir. 1992), the court addressed the "longstanding precedent that evidence of mental instability is relevant for purposes of impeaching a government witness." *Id.* at 82. But in its review of cases where such evidence had been found admissible, a common thread emerged. The mental illness or instability must not only have a clear connection to the witness' credibility – specifically their ability to perceive or to recall events or to testify truthfully – but there must be some showing the witness suffered from the condition "at the time" or "during the time-frame" of the events testified to. *Id.* at 82-83. The court upheld the exclusion of a single report describing the witness as suffering from "atypical depression" and "borderline personality disorder" finding no evidence either condition would impact on the witness' ability to perceive events accurately or testify truthfully. *Id.* at 83. It found that although one could not "rule out" any relationship between the witness' past mental health issues and her credibility, and it was possible the witness' depression "colored her perception of reality," the district court did not abuse its discretion in requiring a tighter nexus to justify the admission of "such personal and potentially stigmatizing material." *Id.* at 83-84.

B. Where, as here, there is no evidence the witness suffered from the mental health condition at or around the time of the incident in question, the admission of a remote mental health diagnosis presents an unacceptable risk of prejudice and constitutes plain error.

Absent any demonstrable connection to the incident in question, the burden of which should lie on the party seeking its admission, evidence of an officer's remote PTSD diagnosis allows a jury to speculate that the officer suffered from PTSD at the time in question and invites it to conclude that the officer more likely than not acted in a manner consistent with someone suffering from symptoms of PTSD. The evidence not only lacks relevance, it presents the unacceptable risk of prejudice that is inherent in improper character evidence. Fed. R. Evid. 404(a)(1) (prohibiting the admission of evidence of a person's character or character trait to prove they acted in conformity with that trait on a particular occasion).

The court in *Butt, supra,* expressly recognized this risk. There, in addition to upholding the exclusion of evidence of the witness' reported conditions, the court also upheld the exclusion of expert testimony of general behavioral traits associated with the reported conditions as impermissible character evidence. *Butt*, 955 F.2d at 85. The expert in *Butt* had never met or examined the witness and *could offer no opinion on her present or past mental condition. Id*. "Quite apart from the fact that the expert testimony bore no relation to [the witness] personally, is the necessarily tentative

nature of its conclusions. It defines psychological terms as a medical textbook might . . . . The testimony describes tendencies only, cataloging a range of behavior that one so diagnosed *might or might not, sometimes,* exhibit." *Id.* (emphasis added). Whatever remote relevance such generalizations might have, they posed a considerable risk of prejudicing and/or confusing the jury. *Id.*

The prejudice resulting from the admission of such evidence can be devastating, and as this case demonstrates, result in a gross miscarriage of justice. Judge Bennett, dissenting below, correctly concluded that "given the complete lack of evidence showing that Officer Acosta suffered from . . . . [PTSD] at the time of the 2013 incident in question," the district court committed plain error in admitting evidence related to Acosta's 2011 diagnosis. App. 43-44. In Judge Bennett's view, whatever "slight" relevance to Acosta's credibility the majority posited from his remote PTSD diagnosis, it was far outweighed by the very substantial risk of unfair prejudice or of misleading the jury. App. 56 (citing *United States v. Hitt*, 981 F.2d 422, 424 (9th Cir. 1992)).

Judge Bennett expressly acknowledged what the majority did not; that "Lam's central theory was that Officer Acosta *acted unreasonably* because of his PTSD." App. 46 (emphasis added). Lam argued to the jury that Acosta's PTSD caused him to "overreact" and respond unreasonably to the circumstances confronting him. App. 48. He used the PTSD evidence "to improperly urge the jury to find that Officer Acosta

acted unreasonably at the time of the incident because he was then suffering from PTSD . . . .” App. 57.

Judge Bennett was correct. In response to Acosta’s motion *in limine* to exclude the PTSD evidence, Lam argued that Acosta’s remote PTSD diagnosis made it “more probable that Acosta acted unreasonably” on the date of this incident and spoke “directly” to Acosta’s “ability to make constitutionally reasonable decisions.” According to Lam, the evidence “[could not] be more probative as related to [Acosta’s] decision to shoot and kill Sonny Lam.” *See* Dkt. 125, 134. Lam’s opening statement to the jury *began* with the representation that Acosta had been previously diagnosed with a “mental health issue” that “interfered with his ability to do his job” and that he concealed that condition from his employer. Dkt. 179 at 86. Lam argued Acosta’s mental health condition caused him difficulties performing his basic job duties, and he ended up shooting Sonny twice: he was not mentally fit. Dkt. 179 at 87. Finally, Lam spent most of his closing argument insisting that Acosta’s PTSD drove his actions on the date of this incident. Lam listed all the symptoms Acosta reported in 2011 and argued that Acosta carried these “demons” with him “every day” to work, including the date of this incident. ER 67-69, 72, 75. He argued that Acosta was “haunted” by these demons, which left a “stain” or a “scar” on his psyche. ER 58-59. He argued that Acosta’s disciplinary record contained incidents that were consistent with actions taken by someone who was hypervigilant, overreactive, and had an increased startle response, all common symptoms of PTSD. ER 66-67. Ultimately, he invited the jury to speculate that entering the Lam household and

drawing his weapon "triggered" Acosta's PTSD and caused him to have an "unreasonable" response to the situation confronting him. ER 63-64, 71-72, 79.

In short, evidence of Acosta's diagnosis and the "characteristics" or "traits" of PTSD were used to prove that Acosta acted in conformity with what one would expect from a person suffering from PTSD. This is impermissible character evidence, and its prejudicial impact cannot be overstated. The dissent properly recognized a "reasonable probability" that this evidence and counsel's arguments caused the jury to conclude Acosta responded to the situation confronting him in an objectively unreasonable manner, thereby leading to its verdict that Acosta used excessive force in violation of the Fourth Amendment. App.58-59.

II.

The opinion below improperly denies qualified immunity by defining the circumstances facing Acosta at a high level of generality: there was no clearly established law that would put every reasonable officer on notice that a suspect who, within a matter of seconds has stabbed an officer, been shot, and dropped his weapon but continues to advance on the officer in a confined space does not pose an immediate threat.

Even where an officer's use of force has been found excessive, qualified immunity will protect the officer from liability unless he has violated "'clearly established statutory or constitutional rights of which a reasonable person would have known.' [Citation.]"

Kisela v. Hughes, 138 S.Ct. 1148, 1152 (2018) (per curiam). "'Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct.' [Citation.]" *Id.* The contours of the right the officer is alleged to have violated must be "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (internal quotations, citation omitted). While there need not be a case directly on point, to deny an officer qualified immunity there must be some precedent which puts the unlawfulness of the officer's conduct in that particular situation "beyond debate." *Kisela* at 1152; *City of Escondido v. Emmons*, 139 S.Ct. 500, 504 (2019) (per curiam). "'[Qualified] immunity protects all but the plainly incompetent or those who knowingly violate the law.'" *Kisela* at 1152.

This Court has repeatedly admonished the lower courts – and particularly the Ninth Circuit – to not analyze the question of whether the law was clearly established law at a high level of generality. *City of Escondido*, 139 S.Ct. at 503; *Kisela*, 138 S.Ct. at 1152; *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1775-1776 (2015); *Ashcroft v. al-Kidd, supra,* 563 U.S. at 742; *Brosseau v. Haugen*, 543 U.S. 194, 198-199 (2004) (per curiam). The need for specificity is crucial in excessive force cases:

> "Specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal

> doctrine, here excessive force, will apply to the factual situation the officer confronts. Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue. [¶] [I]t does not suffice for a court simply to state that an officer may not use unreasonable and excessive force…."

City of Escondido at 503 (internal quotations and citation omitted).

Here, the Ninth Circuit has once again denied an officer qualified immunity by defining the right violated in highly generalized terms. Although the majority did not go so far as to simply state an officer may not use excessive force, it went no further than simply stating that an officer may not use deadly force on a suspect who does not pose an immediate threat. App. 20-32. The majority's various formulations of the clearly established law in these terms provide nothing more than a rephrasing of the general right to be free from excessive force. It is axiomatic that the use of deadly force to apprehend or subdue a suspect who poses "no immediate threat to the officer or others" is per se excessive. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). "The standards from *Garner*… 'are cast at a high level of generality,' so they ordinarily do not clearly establish rights." *Isayeva v. Sacramento Sheriff's Dep't*, 872 F.3d 938, 951 (9th Cir. 2017) (citing *Brousseau v. Haugen*, 543 U.S. at 199). But "it is the facts of particular cases that clearly establish what the

law is." *Isayeva* at 951. And unless the officer's use of force is *obviously* unlawful, there must be existing precedent presenting facts similar to those confronting the officer claiming qualified immunity. *Id*.

Here, the qualified immunity analysis required an inquiry into whether clearly established law would have put every reasonable officer in Acosta's particular situation on notice that Sonny Lam did not pose an immediate threat and so the continued use of deadly force was excessive. The majority relied largely on *Hopkins v. Andaya*, 958 F.2d 881 (9th Cir. 1992) (per curiam), *overruled on other grounds by Saucier v. Katz*, 533 U.S. 194 (2001), a case with facts markedly different from those facing Acosta, to answer that question in the affirmative. App. 22.

As relayed by the majority, the suspect in *Hopkins* grabbed the officer's baton and struck him several times, whereupon the officer fired six shots, injuring but not killing the suspect. App. 22. The officer then retreated and the suspect, no longer holding the baton, continued to advance on the officer. App. 22. When the suspect ignored the officer's warnings to stop, the officer fired again, killing the suspect. App. 22. On review from summary judgment, the court in *Hopkins* could not say as a matter of law the officer acted reasonably in firing the second round of shots, because the suspect "had been wounded and was unarmed" and the officer had alternatives available, such as evasion or waiting for backup or using nonlethal force to subdue the suspect. App. 23 (citing *Hopkins* at 887). The majority here found these facts dispositive of its conclusion that Sonny no longer posed an immediate

threat when Acosta fired his second shot, and therefore his use of deadly force was not objectively reasonable. App. 22, 23. It noted that "Sonny was injured and was not approaching Acosta with scissors, ... Acosta was retreating from Sonny, [and] Acosta could have retreated further, even out of the house, and waited for backup." App. 23. *Hopkins*, according to the majority "clearly established that Acosta's second shot violated the Fourth Amendment . . . ." App. 26.

But the majority failed to acknowledge obvious and critical facts that distinguish *Hopkins* from the circumstances confronting Acosta. In *Hopkins*, the suspect attacked the officer in a parking lot, and after the officer fired the first round of shots he *retreated across a major thoroughfare and hid behind a car* at a gas station on the other side of the street. *Hopkins*, 958 F.2d at 883, 887. When the suspect, now wounded and unarmed, continued to approach and got within a car's length of the officer, the officer fired again. *Id.* Significantly, *several minutes* passed between the first and second round of shots, and the officer had ample opportunity to continue his retreat. *Id.* at 886-887. Here, Acosta was only able to retreat about ten feet down a confined hallway, in an unfamiliar home, with Tan Lam, another potential victim, somewhere behind him. Acosta had only a *few seconds* to decide what to do, a fact the majority inexplicably concluded was "not ultimately meaningful." App. 27. As soon as Acosta reached the end of the hallway and cleared his weapon, he fired the second shot.

The differences between *Hopkins* and the present case "leap from the page." *Kisela, supra,* 138 S.Ct. at

1154 (internal quotations and citation omitted). The majority's reliance on a case with such clearly distinguishable facts "does not pass the straight face test" and would not have put the unlawfulness of Acosta's conduct beyond question. *Id.* (rejecting Ninth Circuit's reliance on a readily distinguishable precedent – comparing the use of deadly force by an FBI sniper on a hilltop against a retreating suspect to that of a police officer against a knife-wielding, mentally ill suspect only six feet from a potential victim – to find "clearly established" law). In marked contrast to *Hopkins*, the facts of this case present exactly the kind of "split-second" decision making by an officer "in circumstances that are tense, uncertain, and rapidly evolving" that this Court has long held should not be second-guessed. *Graham v. Connor*, 490 U.S. 386, 388 (1989).

The majority also relied on a number of other readily distinguishable cases denying qualified immunity where officers continued to use deadly force on a previously armed suspect after an initial use of force rendered the suspect incapacitated. App. 29-31. Those cases could serve only to put a reasonable officer on notice that the continued use of deadly force on a previously armed, wounded suspect is no longer reasonable *where the suspect has actually fallen to the ground* or is otherwise *unable* to pose any threat. *Zion v. County of Orange*, 874 F.3d 1072, 1075-1076 (9th Cir.

2017)[2] (suspect assaulted officer with a knife, was shot nine times and fell to the ground, after which the officer approached and fired nine more shots); *Estate of Jones v. City of Martinsburg*, 961 F.3d 661, 668-670 (4th Cir. 2020) (suspect who had been tased four times hit and stabbed officer during attempts to subdue him, officers moved back and after observing suspect motionless on ground, fired 22 rounds); *Estate of Smart v. City of Wichita*, 951 F.3d 1161, 1175 (10th Cir. 2020) (unarmed suspect lying face down on ground with arms out); *Harris v. Pittman*, 927 F.3d 266, 281 (4th Cir. 2019) (clearly established that "police officer who has just survived a harrowing encounter that required the use of deadly force to extricate himself may not continue to use deadly force once he has reason to know that his would-be assailant is lying on the ground wounded and unarmed…."); *Fancher v. Barrientos*, 723 F.3d 1191, 1201 (10th Cir. 2013) (suspect who had assaulted officer entered police vehicle and put it in reverse, officer fired striking the suspect in the chest, and had time to step back and see the suspect had slumped over and was no longer able to control the vehicle (i.e., was no longer an immediate threat) before firing six more shots); *Meyers v. Baltimore Cnty.*, 713 F.3d 723, 735 (4th Cir. 2013) (officers sat on unarmed suspect who had been tased and fallen to ground, then tased suspect seven more times causing his death); *Brockington v. Boykins*, 637 F.3d 503, 507 (4th Cir. 2011) (officer fires second round of shots at close range

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[2] Although the facts of *Zion* are readily distinguishable from the present case, the majority also erred in relying on *Zion* because it was decided *after* this incident, and so could not have put a reasonable officer in Acosta's position on notice of anything.

after unarmed suspect had fallen to the ground and lay on his back, unable to get up or defend himself).

The clearly established law relied on by the majority at most tells every reasonable officer that where a suspect has assaulted an officer with a deadly weapon, been wounded by the officer's use of deadly force in response, dropped his weapon and *fallen to ground or become clearly incapacitated*, the officer may no longer engage in the continued use of deadly force. There is *no precedent*, however, which would inform every reasonable officer that if the wounded but unarmed suspect *continues to advance on the officer in a confined and unfamiliar space*, the officer must utilize his "split-second" decision making skills to process the fact the suspect no longer has a weapon, put his own firearm securely away, and then select and utilize an alternative means of subduing the suspect, and/or retreat into unfamiliar environs where there is another potential victim to worry about. A wounded but advancing suspect is neither on the ground nor clearly incapacitated, and no clearly established law would have informed Acosta that Sonny no longer posed an immediate threat.

Indeed, given the totality of circumstances leading up to Acosta's second shot (*see District of Columbia v. Wesby*, 138 S.Ct. 577, 589 (2018)), the majority's conclusion that Sonny no longer posed an immediate threat is far from an obvious one. Sonny's reaction when he first encountered Acosta was extreme. He immediately began yelling at Acosta to "get out" and punching his fists into the air. He started pushing Acosta out of the room, and then suddenly turned

around, grabbed a pair of scissors and stabbed Acosta in the forearm. When Acosta shot him in the leg, Sonny did not stop. He continued to follow Acosta down the hallway as Acosta tried to clear his weapon. Acosta was not familiar with the layout of the home and had no idea what his retreat options were. He had no idea if any other weapons were in the home and accessible to Sonny if he continued to retreat. Tan Lam, another potential victim, was somewhere behind him. In the few seconds available to make a decision, would *every reasonable officer* backing down a confined hallway in an unfamiliar home know "beyond debate" that they could no longer use their firearm to subdue such a suspect? Would they know "beyond debate" that they *must* evaluate and select from alternative courses of action? That they *must* put their firearm away and turn to some other non-lethal option such as a baton, or a taser, or pepper spray, or simply the officer's fists? The answer to all of these questions is a resounding "no."

> "The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense."

Saucier v. Katz, 533 U.S. 194, 205 (2001). Here, although the jury concluded that Acosta's use of force was excessive, Acosta could not have known that at the time. The only thing that was "beyond debate" was that Sonny was clearly unstable and had no intention of submitting on his own accord. Because it would not have been clear to every reasonable officer that Sonny no longer posed an immediate threat, the denial of qualified immunity in this case was error.

CONCLUSION

The Ninth Circuit's published decision holding that a remote PTSD diagnosis is per se relevant to a law enforcement officer's credibility, in the absence of any evidence the officer suffered from that condition at the time of the incident in question, presents a dangerous and marked departure not only from its own precedent but from that of its sister circuits which recognize the need for some demonstrable nexus between a witness' mental health condition and the events to which they are testifying. Absent such a nexus, the admission of such evidence is not only irrelevant, it presents an inherent and substantial risk of prejudice and constitutes plain error.

The Ninth Circuit's continued insistence on defining clearly established law at a high level of generality for purposes of analyzing the question of qualified immunity cannot be left uncorrected. A proper analysis in this case required an assessment *not* of whether an officer could use deadly force on a suspect who does not pose an immediate threat, but whether clearly established law would have put every reasonable officer on notice that, under the specific circumstances

presented here, Sonny did not pose an immediate threat. As set forth above, it would not.

This Court should grant the petition for a writ of certiorari and reverse the decision of the Ninth Circuit Court of Appeals on the issues presented herein.

Respectfully submitted,

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