No. 20-1461

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

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I. The petition for a writ of certiorari should be granted to resolve whether it is plain error to admit a remote PTSD diagnosis to impeach an officer's credibility, and to prove they acted in conformity with symptoms characteristic of that diagnosis, absent a non-speculative nexus with the events in question.

A. The issue is not one of discretion, but of plain error.

The Ninth Circuit analyzed the district court's admission of Acosta's remote PTSD diagnosis under a "plain error" standard of review. App. 39-42. To the extent Lam's opposition to the petition for writ of certiorari argues that Acosta waived any challenge to the PTSD evidence, or that appellate courts must defer to the district court's exercise of discretion in the admission or exclusion of evidence, it misses the point. The question as to which Acosta seeks review is whether it is plain error to admit evidence of a remote PTSD diagnosis to attack a police officer's credibility and prove they acted unreasonably where there is no evidentiary nexus between the PTSD diagnosis and the incident in question (i.e., no evidence the officer suffered from or experienced any symptoms of PTSD at the time).

The majority opinion holds that such evidence may be admissible absent such a nexus; an opinion in conflict with those of its sister circuits and one which presents an unacceptable risk of prejudice. That

prejudice manifested itself here, in a verdict premised on the jury's acceptance of Lam's invitation to speculate that Acosta acted in conformity with a person suffering from PTSD at the time of the incident; i.e., to find that because he suffered from PTSD, he acted unreasonably. The public policy implications of allowing such speculative use of a remote mental health diagnosis are national in scale and require correction by this Court. See Pet. 12-14.

B. The majority opinion creates a dangerous precedent in conflict with that of other circuits because it permits the use of a witness' remote mental health diagnosis to impeach their credibility where the evidence allows only speculation as to whether the witness actually suffered from that condition at the time of the event in question.

The majority held that Acosta's two-and-a-half-year-old PTSD diagnosis was relevant to his perception of events at the time of the incident, and his ability to recall those events accurately. App. 40-41. But although the symptoms Acosta self-reported to Nurse Practitioner Jimenez and Dr. Shuman in 2011 could certainly have impacted on his "ability to accurately perceive and recall" events *at that time*, there was no evidence Acosta suffered from any of those symptoms at the time of this incident. The majority and Lam point to testimony from Dr. Mohandie that *in general* persons diagnosed with "prolonged" PTSD (lasting 90 days or more) are likely to continue to experience

symptoms without treatment. App. 40; Opp.[1] 21. This testimony allowed the jury to speculate that Acosta in fact suffered from PTSD at the time of this incident, and therefore acted unreasonably.

But Dr. Mohandie never personally examined Acosta himself, and *he could not say whether Acosta actually suffered from PTSD at the time of this incident*. ER 303-305, 307, 322. The best he could say was he thought Acosta should have been assessed for his fitness for duty. ER 305. He conceded that PTSD is common in law enforcement, and not every officer with PTSD is incapacitated or needs to report their symptoms; many can function through it on their own. ER 306, 325. Missing from Dr. Mohandie's testimony is any non-speculative connection between Acosta's PTSD diagnosis in early 2011 and his response to the incident at Lam's home in September of 2013. Such a connection is also missing from the majority opinion, which, referencing Dr. Mohandie's testimony, holds that "[t]o 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 credibility." App.40-41 (emphasis added).

The majority cited several cases for the proposition that a witness' mental health condition may be relevant to their credibility if the condition could affect their ability to perceive or recall events or to tell the truth. App. 39-40 (citing *Boyd v. City & County of San Francisco*, 576 F.3d 938 (9th Cir. 2009); *United States v. Kohring*, 637 F.3d 895 (9th Cir. 2011); *United States*

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[1] Opposition to Petition for Writ of Certiorari.

v. Sasso, 59 F.3d 341 (2d Cir. 1995)). It then went one step further to "join" its sister circuits in holding that such evidence could be relevant even if it consists of a remote diagnosis from several years prior to the incident in question. App. 41 (citing *United States v. Love*, 329 F.3d 981 (8th Cir. 2003); *United States v. Smith*, 77 F.3d 511 (D.C. Cir. 1996)). Missing from the majority's analysis, and Lam's opposition to this petition, is any recognition that the relevance of a remote diagnosis depends on a demonstrable nexus between the diagnosis and the events in question. Pet. 15-17 (discussing how cases all require evidence the witness suffered from the condition at or near the time of the incident). The need for that demonstrable (non-speculative) nexus is undermined by the majority opinion in this case and must be corrected.

C. Permitting a jury to speculate that a witness' remote mental health diagnosis makes them less credible, and more likely to have acted in conformity with traits associated with that diagnosis, creates an unacceptably high risk of prejudice.

Lam is incorrect that Acosta did not object to the PTSD evidence as improper character evidence. That objection, pursuant to Fed. R. Evid. 404, was raised in his motion in limine to exclude the PTSD evidence. See Dkt.12 at 24-25. And although the Ninth Circuit did not specifically address Acosta's contention that his remote diagnosis was improperly used as character evidence – to prove that his PTSD caused him to act unreasonably in his use of force during this incident – the centrality of this argument at trial cannot be

understated. It serves as a stark example of the unacceptably high risk of prejudice that can come with the admission of such evidence. Judge Bennett addressed that prejudice and the plain error in admitting this evidence in his dissent. He noted this was a close case, and that Lam's "main theory" of the case was that Acosta responded to this incident unreasonably *because of* his PTSD. App. 58-59.

The admission of evidence of a remote mental health diagnosis invites the jury to speculate that the witness suffered from the condition at the time of the incident and acted in conformity with symptoms characteristic of the condition. The First Circuit has recognized this risk in *United States v. Butt*, 955 F.2d 77 (1st Cir. 1992). See Pet. 17-19. Evidence of traits associated with a particular condition describe tendencies only, and a person suffering from said condition *might or might not* exhibit such traits at any given time. *Butt* at 85. It follows that the absence of any evidence the witness suffered from the condition at the time in question raises the risk of prejudice from such testimony to an unacceptable level.

Lam's suggestion that the PTSD evidence was not prejudicial because there was ample other evidence reflecting on Acosta's credibility is not well-taken. One need only look at the opening and closing statements of Lam's counsel to understand that the PTSD evidence was the "crucial building block" of his case. See App. 59 (J. Bennett, dissenting). Lam's references to alleged inconsistencies between Acosta's trial testimony and his statements to investigators at the time of the incident and/or at deposition, consist entirely of

assertions made in counsel's questions to Acosta that *implied* inconsistencies but that were never conceded by Acosta. Opp. 11-12. Acosta either denied the prior statements or testified he did not remember what he had said, and the actual prior statements were never admitted into evidence. There was no actual evidence of the alleged inconsistent statements. The jury's verdict undeniably rested on its acceptance of Lam's argument that Acosta acted unreasonably because he was suffering from PTSD and "carrying these demons" with him when he arrived at Lam's home. ER 58, 69.

II. The Ninth Circuit has once again defined the clearly established law for a qualified immunity analysis at an unacceptably high level of generality.

A. The dispositive question for the qualified immunity analysis is whether any reasonable officer would have understood that a previously armed suspect who had been shot but continued to advance on the officer in a confined and unfamiliar space should be viewed as "incapacitated" or no longer posing an immediate threat.

There is a reason that specificity is required in defining the clearly established right of which a reasonable police officer must be aware in order to be denied qualified immunity. Every officer knows that the use of excessive force is unlawful, but it can be difficult to know, in "tense, uncertain and rapidly evolving" situations whether the factual circumstances confronting the officer render a particular use of force excessive. *Graham v.* Connor, 490 U.S. 386, 388 (1989).

The reasonableness of an officer's use of force "is judged against the backdrop of the law at the time of the conduct" and the result "depends very much on the facts of each case[.]" *Kisela v. Hughes*, 138 S.Ct. 1148, 1152 (2018); *City of Escondido v. Emmons*, 139 S.Ct. 500, 503 (2019) (per curiam). For this reason, it is inappropriate to define the clearly established right in this case as whether an officer may use deadly force on an unarmed or previously armed suspect who no longer poses an immediate threat. App. 25-32; Opp. 28.[2] Clearly they may not.

Framed with the requisite degree of specificity, the dispositive question in this case is whether the law was clearly established that an officer may not use deadly force on a suspect who has attacked the officer with a deadly weapon, has been wounded, and although no longer armed continues to advance on the officer in a confined and unfamiliar space. In other words, would it be clear to every reasonable officer that the suspect does *not* pose an immediate threat under those circumstances? None of the cases cited by the majority present such a scenario. See Pet. 23-28.

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[2] While the majority emphasizes that it is clearly unlawful to use deadly force on a suspect who no longer poses an immediate threat, Lam prefers to emphasize that an officer may not use deadly force on an "incapacitated" suspect. Neither describes the circumstances facing Acosta here. Even if, as Lam insists the jury could have found, Sonny was "stumbling" towards Acosta, he was still advancing – not incapacitated – and a reasonable officer could still have viewed Sonny as an immediate threat.

B. Lam's opposition provides no clearly established law that would govern the situation facing Acosta.

None of the additional cases cited by Lam in his opposition present a scenario that would put Acosta on notice that a suspect like Sonny no longer posed an immediate threat either. Opp. 31-32. In *Hunter v. Leeds*, 941 F.3d 1265 (11th Cir. 2019), the suspect pointed a gun at the officer who fired three shots in response. *Hunter* at 1277. Viewing the facts most favorable to plaintiff, the suspect then dropped his weapon out of an open passenger door and made no effort to flee or otherwise threaten the officer. *Id.* at 1280. The officer then fired several more shots at the now unarmed suspect. *Id.* at 1277. The court held it was proper to deny qualified immunity under these facts because it is clearly established an officer may not use deadly force on an unarmed suspect who poses no immediate threat. *Id.* at 1280-1281.

In *Waterman v. Batton*, 393 F.3d 471 (4th Cir. 2005) the court reversed a denial of qualified immunity for officers who fired a series of shots at a suspect who was accelerating towards them in a vehicle, and then fired a second series of shots after the suspect passed them. *Id.* at 474-475. Even though a jury could find the second round of shots to be excessive, the law was not clearly established that the officers' conduct would be unlawful given the entire sequence of events involved a tense, rapidly evolving situation spanning only a few seconds. *Id.* at 477, 482-483.

In *McCoy v. Meyers*, 887 F.3d 1034 (10th Cir. 2018) the court reversed a grant of qualified immunity for

officers who, having used a carotid restraint maneuver to subdue (and render unconscious) a suspect, then used the same maneuver a second time after the suspect regained consciousness, even though he was now in handcuffs with his legs zip-tied together. *Id.* at 1038. Qualified immunity could not protect the officers for their second use of the carotid restraint when the suspect clearly no longer posed a threat.

In *Ellis v. Wynalda*, 999 F.2d 243 (7th Cir. 1993) the court held qualified immunity was inappropriate for an officer who shot a fleeing burglary suspect in the back, when they had no reason to believe was armed or posed an immediate threat to anyone. *Id.* at 247.

In *Dickerson v. McClellan*, 101 F.3d 1151 (6th Cir. 1996) the court reversed a grant of qualified immunity for an officer who, viewing the facts most favorably to plaintiff, fired his weapon at a suspect standing inside his home, at an unopened storm door, with his hands at his side. *Id.* at 1154-1155, 1163.

And finally, in *Ellison v. Lesher*, 796 F.3d 910 (8th Cir. 2015) the court affirmed the denial of qualified immunity to officers who shot an unarmed man who was not advancing on the officers but merely "standing in his own home after [the officers] unlawfully entered his apartment and ignored his requests to leave[;]" circumstances under which no reasonable officer would view the man as an immediate threat. *Lesher* at 916-917.

The factual differences between these cases and the situation confronting Acosta in this case "leap from the page." *Kisela*, 138 S.Ct at 1154.

C. Lam's questioning of existing qualified immunity jurisprudence is not a reason to deny this petition.

Lam argues that the degree of specificity required by this Court's existing qualified immunity jurisprudence is "excessive" and at odds with the real-world decision-making processes actually engaged in by police. Opp. 34-36. He cites a single study in the University of Chicago Law Review that argues police officers do not receive regular training or education about recent excessive force decisions that would actually put them on notice of specific factual situations in which their use of force could be considered excessive. Opp. 35 (citing Joanna C. Scwartz, *Qualified Immunity's Bold Lie*, 88 U.Chi.L.Rev. 605 (2021)). Whether or not the doctrine of qualified immunity is realistic in its assumption that officers are actually aware of existing law that would put them on notice that their conduct is clearly unlawful is not at issue in this case. What is at issue is the Ninth Circuit's continued insistence on defining clearly established law at a high level of generality in order to avoid application of this Court's existing and controlling jurisprudence on the doctrine. Left uncorrected, the majority opinion leaves police officers in an entire region of the country to speculate as to whether their use of force in tense and rapidly evolving circumstances will be viewed as unreasonable by those in a comfortable position to second-guess decisions that in reality, as demonstrated here, must be made in a matter of seconds.

CONCLUSION

For all the reasons set forth in the petition and this reply, Acosta respectfully submits that the petition for a writ of certiorari should be granted on the issues presented herein, or alternatively, the decision of the Ninth Circuit Court of Appeals be summarily reversed as to those issues.

Respectfully submitted,

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