No. _____

In the Supreme Court of the United States

DEPUTY SHERIFF JONATHAN LOZADA, IN HIS INDIVIDUAL CAPACITY,

Petitioner,

v.

DUDLEY TEEL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SUSAN TEEL,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

SUMMER M. BARRANCO
Counsel of Record
RICHARD A. GIUFFREDA
PURDY, JOLLY, GIUFFREDA, BARRANCO & JISA, P.A.
2455 East Sunrise Boulevard,
Suite 1216
Fort Lauderdale, Florida 33304
Telephone: (954) 462-3200
Telecopier: (954) 462-3861
summer@purdylaw.com
richard@purdylaw.com

Counsel for Petitioner

April 16, 2021

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

Whether this Court should clarify the application of the *Graham* factors to a law enforcement officer's use of force during a call for service that does not involve commission of a crime as the officer should not start off, as the Sixth Circuit has described, with two strikes against him or her regarding the severity of the crime and intentional resistance to arrest factors.

Whether the obvious factual clarity rule can be applied by a Circuit Court panel to deny qualified immunity to a law enforcement officer in a Fourth Amendment excessive force case, where the District Court determined at the summary judgment stage of the case that the officer's use of deadly force was constitutional as a matter of law.

Whether the Eleventh Circuit misapplied the *Graham* factors to the evidence and improperly judged Deputy Lozada's conduct in hindsight.

Whether the Eleventh Circuit engaged in reversible error in finding that Deputy Lozada is not entitled to qualified immunity under the unique facts of this case, despite the absence of factually similar case law, by application of the obvious factual clarity rule contrary to this Court's prior opinions.

This case involves the split second decision by Indian River County Sheriff's Deputy Jonathan Lozada to use deadly force on Mrs. Susan Teel in the bedroom of her home while she walked toward Lozada with a large knife wielded overhead in a threatening manner.

Lozada fired his weapon as he attempted to retreat, during which time Mrs. Teel continued to advance despite being shot. A third and final shot ended the deadly threat Mrs. Teel posed to Lozada who was only feet away. It is undisputed that Mrs. Teel was suicidal, as reported by her husband, Dr. Teel, and that she was under the influence of both alcohol and medication at the time of the incident. Mrs. Teel had cut herself with the knife, and was bleeding. Dr. Teel had blood on his clothing when Lozada first encountered him upon arrival at the home as the result of Dr. Teel's failed attempt to control and disarm his wife. The only surviving eye witness to the encounter was Deputy Lozada, who was crisis intervention team trained, as well as a member of the Sheriff's Office's Crisis Negotiating Team. There is no video of the incident.

Deputy Lozada's motion for summary judgment was granted by the District Court, which found that Lozada's use of deadly force was constitutional as a matter of law. As a result, the District Court never reached the issue of qualified immunity. The Eleventh Circuit reversed in part, finding, among other things, that Lozada was not entitled to qualified immunity as the facts of this case presented a clearly obvious violation of the Constitution and that because this case did not involve the commission of a crime, the *Graham* factors weighed against Deputy Lozada.

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Teel v. Lozada and Sheriff, 2019 WL 7945692 (S.D. Fla. 2017)

Teel v. Lozada, 826 F.Appx. 880 (9/23/20 11th Cir.) (reversing judgment in part, vacating in part).

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS AND ORDERS BELOW

The panel opinion below is an unpublished opinion that can be found at 826 F.Appx. 880 (11th Cir. 2020). (Pet. App. 1). The per curiam denial of the petition for rehearing and rehearing en banc is not published. (Pet. App. 40). The district court's opinion regarding Defendants' motions for summary judgment is unpublished but can be found at 2019 WL 7945692 (S.D. Fla. Oct. 17, 2019)(Pet. App. 21).

JURISDICTION

The Eleventh Circuit entered judgment on September 23, 2020 (Pet. App. 1) and denied the petition for rehearing and rehearing en banc on November 18, 2020. (Pet. App.40). By Order of this Court dated March 19, 2020, due to the pandemic, this petition's filing date is April 16, 2021. The Court has jurisdiction under Title 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Title 42 U.S.C. §1983 case involves the Fourth Amendment to the United States Constitution.

The Fourth Amendment to the United States Constitution reads as follows:

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

Title 42 U.S.C. §1983 reads as follows:

> 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Basis for Federal Jurisdiction in the Court of First Instance

The District Court had jurisdiction pursuant to Title 28 U.S.C. §§ 1331, 1343 and 1367. The Circuit Court had jurisdiction pursuant to Title 28 U.S.C. §1291.

B. The Underlying Events

On the evening of July 26, 2017, Mrs. Teel's daughter called 911 reporting that her mother had attempted suicide. The dispatcher announced over the radio that Mrs. Teel had possibly cut herself and was under the influence of alcohol. Deputy Lozada, who was on patrol at that time, responded to this dispatch. Deputy Lozada at the time of the incident, was Crisis Intervention Team (CIT) trained and a member of IRCSO's Crisis Negotiation Team.

When Deputy Lozada arrived at the Teel residence, he spoke briefly with Mrs. Teel's husband, Dr. Dudley Teel, while standing in the doorway of their home. Dr. Teel explained that Mrs. Teel was upstairs and was trying to kill herself with a knife. Deputy Lozada noticed that there was fresh blood on Dr. Teel's clothing.

Upon entering the house, before heading upstairs, Deputy Lozada drew his gun for officer safety reasons. Once Lozada reached the top of the stairs, he saw Mrs. Teel. She was lying on the bed in the master bedroom and was wearing a large thick red bathrobe which

concealed the extent of her self-inflicted injuries. While standing at the threshold of her bedroom, Deputy Lozada called out "Sheriff's Office, let me see your hands." Deputy Lozada then took two or three steps into the bedroom.

Once Mrs. Teel arose from the bed, Deputy Lozada saw that she was holding a large 13" knife with an 8" blade. Mrs. Teel held the knife in the air with the blade pointed down, as though preparing to stab someone and began walking towards Lozada. In response, he took a step backwards. As Mrs. Teel walked, she said "Fuck you. Kill me." By this point, Deputy Lozada had aimed his gun at Mrs. Teel. Deputy Lozada got on his radio and said "Indian River, she's got a knife. Give me 10-33" (emergency traffic). Mrs. Teel continued to "take steps towards" Deputy Lozada and said "Come on, just do it." During this time, Deputy Lozada started retreating. He sees Mrs. Teel continue to approach him with the raised knife. When she is no more than ten feet from him, and feeling that he is in imminent danger of being severely injured or killed, Deputy Lozada fires his gun at her, striking her. However, she continues to approach. He then fires a second round which also strikes her, but she continues to approach. By this time, Deputy Lozada had backed up into the doorway of the master bedroom and then out into an adjacent sitting room located at the top of the stairs. At this point, Deputy Lozada shoots Mrs. Teel a third and final time which causes her to collapse in the doorway of the master bedroom where she dies.

At no point did Deputy Lozada specifically tell Mrs. Teel to drop her knife or warn her that he would use

deadly force against her. On the radio transmission during the incident, Deputy Lozada can be heard saying to Mrs. Teel: "don't come...." Deputy Lozada had non-lethal weapons with him at the time, including pepper spray and a Taser.

C. The District Court Granted Summary Judgment and Found that Deputy Lozada's Use of Deadly Force Did Not Violate the Constitution

The District Court granted summary judgment for Deputy Lozada finding that his actions in shooting Mrs. Teel did not violate the Fourth Amendment. In so holding, the district court judge stated:

> The constitutionality of Defendant Lozada's actions are resolved on the basis of the agreed testimony. In Defendant's Statement of Material Facts, the shooting is described as follows:
>
> Mrs. Teel continues to advance and says "Come on, just do it." During this time, Deputy Lozada starts retreating. He sees Mrs. Teel continue to approach him with the raised knife. Feeling that he is in imminent danger of being injured or killed, he fires his gun at her, striking her. However, she continues to approach. He then fires a second round which also strikes her, but she continues to approach. By this time, Deputy Lozada had backed up into the doorway of the master bedroom and then out into an adjacent sitting room located at the top of the stairs. At this point, he shoots Mrs. Teel a third and final

time which causes her to collapse in the doorway of the master bedroom. (DE 29 at ¶ 16) (emphasis added) (citations omitted).

In response to Defendant's statement in paragraph 16, Plaintiff responds:

Disputed as to Lozada's claim that he was in imminent danger. Lozada admits there was no zone of danger before he came upstairs. And Lozada admits he did not believe his life was in danger before he came into her nedroom [sic] with his gun drawn, after which, she started moving towards him. Lozada never told Mrs. Teel to drop the knife prior to discharging his firearm three times. Lozada never gave her a warning.

Perhaps given that Defendant Lozada was the only living person to see these events occur and was not wearing a body camera there could be room for doubt. However, this court is bound by the facts on which the Parties have agreed. On a motion for summary judgment, this court must accept as true material facts which are not disputed. See generally, *Celotex Corp. v. Catrett*, 477 U.S. at 323.

Here, Plaintiff does not in any way dispute that Mrs. Teel continued to walk towards Defendant with a knife before each shot that Defendant Lozada fired. Even construing these facts in the light most favorable to Plaintiff, this is a central admission to the disposition of this case; Fourth

Amendment excessive force cases often turn on whether the victim was moving towards the officer, particularly if the individual is armed.

The Parties agree that Mrs. Teel was verbally engaging with Defendant Lozada, saying "Come on, do it" and at each relevant instance continued to "approach" him. Given these agreed facts, a reasonable jury could not find that Mrs. Teel was doing anything other than walking at Defendant Lozada. (DE 29 at ¶ 15, 16). Further, Plaintiff does not dispute that as Mrs. Teel walked towards Defendant Lozada, she kept the knife in her hand the entire time. *McKinney by McKinney v. DeKalb Cty., Ga.*, 997 F.2d 1440, 1443 (11th Cir. 1993) (affirming denial of qualified immunity where decedent had "previously put down his knife"). So long as Mrs. Teel was holding the knife the entire time, the position of the weapon did not matter. *Shaw v. City of Selma*, 884 F.3d 1093, 1100 (11th Cir. 2018) (finding it immaterial whether a hatchet was held by the decedent's "side, behind his back, or above his head" before deadly force was used);

Finally, neither Party disputes that this shooting took place in and immediately outside Mrs. Teel's bedroom. While the exact number of feet are disputed, even taking the facts in the light most favorable to Plaintiff, there can be no doubt that Mrs. Teel was relatively close to Defendant Lozada. Further, although the Parties agree that Defendant Lozada failed to

> issue a warning, "an officer's failure to issue a seemingly feasible warning—at least, to a person appearing to be armed—does not, in and of itself, render automatically unreasonable the use of deadly force." *Quiles v. City of Tampa Police Dep't*, 596 F.Appx. 816, 820 (11th Cir. 2015).
>
> . . .
>
> Based on the agreed facts and applicable precedent, I find that Defendant Lozada did not violate the constitution and thus there is no need for me to discuss the issue of qualified immunity. Had Mrs. Teel stopped walking after any shot, or had she dropped the knife at any point, I might reach a different conclusion, but based on the agreed facts, a reasonable officer would be justified in using deadly force. While I deeply sympathize with the Teel family, I must apply the law as it stands. Therefore, summary judgment is granted for Defendant Lozada as to Count I. (Pet. App. 21, pgs. 6-10).

D. The Appeal and the Eleventh Circuit Panel's Opinion

Plaintiff's appeal followed. The Eleventh Circuit panel issued an unpublished opinion which reversed in part and vacated in part the judgment finding, among other things, that Deputy Lozada was not entitled to qualified immunity as the facts of this case presented a clearly obvious violation of the Constitution and that because this case did not involve the commission of a

crime, the *Graham* factors weighed against Deputy Lozada. (Pet. App. 1).

REASONS FOR GRANTING THE WRIT

I. WHETHER THIS COURT SHOULD CLARIFY THE APPLICATION OF THE *GRAHAM* FACTORS TO A LAW ENFORCEMENT OFFICER'S USE OF FORCE DURING A CALL FOR SERVICE THAT DOES NOT INVOLVE COMMISSION OF A CRIME AS THE OFFICER SHOULD NOT START OFF, AS THE SIXTH CIRCUIT HAS DESCRIBED, WITH TWO STRIKES AGAINST HIM OR HER REGARDING THE SEVERITY OF THE CRIME AND INTENTIONAL RESISTANCE TO ARREST FACTORS.

A. The *Graham* Factors Do Not Provide Sufficient Guidance to Courts When Dealing With Police Uses of Force in Non-Criminal Matters

Deputy Lozada is a first responder under Florida law[1] as are many police officers around the United States. As such, police officers respond to calls for service that do not involve an initial report of criminal

[1]*See* §112.1815, Fla. Stat. (2017) and Art. VII, §(6)(f)(3)(a) (Fla) ("First responder means a law enforcement officer, a corrections officer, a firefighter, an emergency medical technician or a paramedic.")

activity on a regular basis.[2] For example, police officers in Florida have the authority to civilly commit a person who poses a threat to themselves or others, such as a suicidal person, pursuant to Florida's Baker Act law. *See* §§394.451 – 394.47892, Fla. Stat. (2017). They also have the authority to civilly commit a person who is intoxicated or substance abuse impaired and who poses a danger to themselves as a result of such impairment pursuant to Florida's Marchman Act law. *See* §397, Fla. Stat. (2017). In addition, Sheriffs and deputy sheriffs have many other powers, duties and obligations under Florida law beyond enforcing criminal laws. *See* §30.15, Fla. Stat. (2017).

Courts have recognized that the government has an important interest in providing assistance to those in the throes of a mental health crisis.[3] In fact, "[p]olice in all jurisdictions have the authority to detain a person who appears to pose an imminent danger, . . . 38 states explicitly authorize police and peace or parole officers

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[2]Deputy Lozada had probable cause or at least arguable probable cause to take Mrs. Teel into custody for involuntary commitment under Florida's Baker Act which is a Fourth Amendment seizure. *See Bright v. Thomas*, 754 F. Appx. 783 (11th Cir. 2018) and *Anaya v. Crossroads Managed Care Sys., Inc.*, 195 F.3d 584, 590-91 (10th Cir. 1999). Mrs. Teel's resistance to that effort constituted an obstruction under §843.02, Fla. Stat. Additionally, Deputy Lozada would have had probable cause or at least arguable cause to believe Mrs. Teel committed an aggravated assault on a law enforcement officer when she approached Lozada with a knife.

[3]*See* Seth W. Stoughton, *How the Fourth Amendment Frustrates the Regulation of Police Violence*, 70 Emory L.J. 521, 555 (2021)(internal references omitted).

to initiate the emergency hold process," and the remaining states allow officers to effect a hold initiated by a judge, medical professional, social worker, or other authorized entity."[4] These types of calls, which at least initially do not always involve a crime, often require law enforcement to use force on the person in crisis in order to resolve the situation.

As this Court noted in *Graham:*

> [d]etermining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of " 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' " against the countervailing governmental interests at stake. *Id.*, at 8, 105 S.Ct., at 1699, quoting *United States v. Place*, 462 U.S. 696, 703, 103 S.Ct. 2637, 2642, 77 L.Ed.2d 110 (1983). Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. *See Terry v. Ohio*, 392 U.S., at 22–27, 88 S.Ct., at 1880–1883. Because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447 (1979), however, its proper application requires careful attention to the

[4] *See* footnote 3.

> facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *See Tennessee v. Garner*, 471 U.S., at 8–9, 105 S.Ct., at 1699–1700 (the question is "whether the totality of the circumstances justifie[s] a particular sort of … seizure"). The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. *See Terry v. Ohio, supra*, 392 U.S., at 20–22, 88 S.Ct., at 1879–1881.

Graham, 490 U.S. at 396.

The Eleventh Circuit panel opinion incorrectly concluded that "[b]ecause this situation does not involve a criminal arrest, our facts do not fit neatly within the *Graham* framework. Indeed, because Florida does not recognize attempted suicide as a crime, it is impossible for this [C]ourt to measure the severity of the crime at issue. We have little trouble, then, concluding that this *Graham* factor weighs in favor of Dr. Teel."(internal citation and quotes omitted) (Pet. App. 1, pg. 12).[5] The Eleventh Circuit's

[5] The Eleventh Circuit also applied the *Graham* factors in a similar one sided rigid way in *Mercado v. Orlando,* 407 F.3d 1152 (11th Cir. 2005).

application of the *Graham* factors as a rigid inflexible framework to a case involving an armed suicidal person, who could become homicidal without warning, ignores this Court's repeated statements that ultimately the issue is one of reasonableness. *Scott v. Harris*, 550 U.S. 372 (2007) and *Kisela v. Hughes*, 138 S.Ct.1148 (2018). This Court should address the correct application of the *Graham* factors in cases involving the use of force during calls that do not initially involve the commission of a crime such as was done by the Sixth Circuit in *Estate of Hill v. Miracle*, 853 F.3d 306 (6th Cir. 2017).

In *Miracle*, *supra*, a deputy responded to a medical call involving low blood sugar. The deputy arrived after the medics, who had already begun treating the patient. The patient became combative and violent, continuing to kick, swing and swear at the paramedics. The deputy was aware that persons suffering from low blood-sugar are often disoriented and unaware of their surroundings. The deputy tased the patient as a result of his violent behavior. The Taser worked and the patient was successfully treated by the paramedics. The important aspect of this case is that it involved the correct application of the *Graham* factors in recognition of the fact that a medical call does not involve criminal behavior or resistance to arrest and as such the defendant law enforcement officer should not start out with two strikes against him when applying the *Graham* factors. The Sixth Circuit stressed that the proper application of *Graham* is to examine the overall objective reasonableness of the force used. *Id.*, at 312-14. The Sixth Circuit correctly described the problem

with applying the *Graham* factors to a call that does not involve the commission of a crime where it stated:

> ". . . [A]pplying the *Graham* factors to the situation Miracle faced is the equivalent to a baseball player entering the batter's box with two strikes already against him. In other words, because Hill had not committed a crime and was not resisting arrest, two of the three *Graham* factors automatically weighed against Miracle. The key problem is that the district court tried to apply the *Graham* factors to a completely different factual situation-a medical emergency-where there was no crime, no resisting of arrest, and no direct threat to the law-enforcement officer. In doing so, the court failed to see the forest (the overall standard of objective reasonableness) for the trees (the three factors to use as an aid in assessing objective reasonableness in the typical situation)." *Id* at 313.

The Sixth Circuit went on to conclude that:

> "Where a situation does not fit within the *Graham* test because the person in question had not committed a crime, is not resisting arrest, and is not directly threatening the officer, the court should ask:

> (1) Was the person experiencing a medical emergency that rendered him incapable of making a rational decision under circumstances that posed an immediate threat of serious harm to himself or others?
> (2) Was some degree of force reasonably necessary to ameliorate the immediate threat?
> (3) Was the force used more than reasonably necessary under the circumstances (i.e., was it excessive)?
>
> If the answers to the first two questions are "yes" and the answer to the third question is "no", then the officer is entitled to qualified immunity."

Id. at 314. The Sixth Circuit also concluded that these questions, like the *Graham* factors, serve as a guide and are non-exhaustive.

B. As the *Graham* Factors Do Not Address the Non-Criminal Matters that Officers Often Are Faced With as Part of Their Normal Duties, Circuit Courts Are Fashioning their Own Analyses, While Others Merely Gloss Over the Factors, Which Ends Up With Results That Do Not Align with the Spirit of *Graham*

In addition to the Sixth Circuit's analysis noted above, the Fourth Circuit similarly applies the *Graham* factors noting that in a case involving an armed

suicidal person the severity of the crime factor cannot be taken into account because there was no crime. *Estate of Armstrong ex rel. Armstrong v. Village of Pinehurst*, 810 F.3d 892 (4th Cir. 2016); *Connor v. Thompson*, 647 F. Appx. 231 (4th Cir. 2016).

The Fifth Circuit in *Harris v. Serpas*, 745 F.3d 767, 772 (5th Cir. 2014) in discussing application of the *Graham* factors noted that:

> [t]he United States Supreme Court has long held that courts must look at the "totality of the circumstances" when assessing the reasonableness of a police officer's use of force. *Graham*, 490 U.S. at 396, 109 S.Ct. 1865 (citing *Tennessee v. Garner*, 471 U.S. 1, 8–9, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)). This Court, however, has narrowed that test, holding that "[t]he excessive force inquiry is confined to whether the [officer] was in danger at the moment of the threat that resulted in the [officer's] shooting." *Bazan*, 246 F.3d at 493. Therefore, any of the officers' actions leading up to the shooting are not relevant for the purposes of an excessive force inquiry in this Circuit.

Harris, 745 F.3d at 774 (affirming grant of qualified immunity, where officers responded to 911 call by wife concerned that her husband attempted to commit suicide, he was armed with a knife, he was getting up out of bed and raising the knife above his head, and then one of the officers fired his weapon).

The Fifth Circuit in *Rockwell v. Brown*, 664 F.3d 985, 993 (5th Cir. 2011) noted that it did not need to apply all of the *Graham* factors to determine reasonableness–what mattered was whether the officers reasonably felt threatened in the moment they used the force. (*See Rockwell*, *supra*, affirming grant of summary judgment, where officers responded to 911 call by mother regarding her son who was bi-polar, schizophrenic, and had a history of being suicidal, who had threatened her, was armed with two knives, rushed at the officers with the knives, lacerated one of the officers, and then the officers fired their weapons).

In *Ames v. King Cty., Washington*, 846 F.3d 340, 348 (9th Cir. 2017), the Ninth Circuit reviewed an interlocutory appeal which required the Court to address the reasonableness of actions taken by Sheriff's Deputies who were functioning in their community caretaking capacities during a life-and-death medical emergency. In reversing the district court's denial of qualified immunity on the excessive force and unlawful search claims, the Ninth Circuit concluded that the deputies' actions were objectively reasonable in light of the urgent need to deliver life-saving care to an overdose victim, and to ensure the safety of everyone at the scene:

> The government interest in subduing here was substantial. The first *Graham* factor speaks of the "severity of the crime at issue," but we think the district court applied this factor too narrowly when it focused on Ames's misdemeanor obstruction of Deputy Volpe rather than the nature of the ongoing emergency exacerbated by

> Ames's resistance. Deputy Volpe was acting in her community caretaking capacity, "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute," when she responded to the 911 call for help. *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973); *see also United States v. Stafford*, 416 F.3d 1068, 1073 (9th Cir. 2005) (explaining that the "emergency doctrine is based on and justified by the fact that, in addition to their role as criminal investigators and law enforcers, the police also function as community caretakers"). Thus, we believe the better analytical approach here under the first *Graham* factor should be to focus our inquiry not on Ames's misdemeanor crime of obstruction but instead on the serious—indeed, life-threatening—situation that was unfolding at the time. Ames was prolonging a dire medical emergency through her disregard of Deputy Volpe's lawful commands, and her actions risked severe consequences. Because the gravity of Deputy Volpe's community caretaking responsibilities under these circumstances must be factored into the analysis, we conclude that the first *Graham* factor weighs in Deputy Volpe's favor.

Ames, 846 F.3d at 348–49[6].

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[6]In its application of the *Graham* factors, the Ninth Circuit has noted that the second factor—whether there is an immediate threat to the safety of the arresting officer or others—is the most

On the other end of the spectrum, the First Circuit has taken a more rigid approach to the *Graham* factors much like the Eleventh Circuit did in the case at bar. In a case that involved a person suffering from mental illness who had absconded from the hospital, the First Circuit found that the first *Graham* factor weighed against the involved officer because the officer was not present to investigate a crime. *Gray v. Cummings*, 917 F.3d 1 (1st Cir. 2019), citing *Estate of Armstrong ex rel. Armstrong v. Village of Pinehurst*, 810 F.3d 892, 899(4th Cir. 2016). Such an overly rigid interpretation of the *Graham* factors ultimately misses the forest for the trees and the whole point of the Fourth Amendment's reasonableness analysis which this Court has repeatedly stated involves a review of the totality of the circumstances as known to the officer on the scene without the benefit of 20/20 hindsight.

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important. *See Smith v. City of Hemet*, 394 F.3d 689, 702 (9th Cir. 2005) (en banc).

II. WHETHER THE OBVIOUS FACTUAL CLARITY RULE CAN BE APPLIED BY A CIRCUIT COURT PANEL TO DENY QUALIFIED IMMUNITY TO A LAW ENFORCEMENT OFFICER IN A FOURTH AMENDMENT EXCESSIVE FORCE CASE, WHERE THE DISTRICT COURT DETERMINED AT THE SUMMARY JUDGMENT STAGE OF THE CASE THAT THE OFFICER'S USE OF DEADLY FORCE WAS CONSTITUTIONAL AS A MATTER OF LAW.

In *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) this Court stated:

> *Graham* and *Garner*, following the lead of the Fourth Amendment's text, are cast at a high level of generality. *See Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865,104 L.Ed.2d 443 (1989). "'[T]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application'"). Of course, as this Court has stated: in an obvious case, these standards can "clearly establish" the answer, even without a body of relevant case law. *See Hope v. Pelzer*, 536 U.S. 730, 738, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002) (noting in a case where the Eighth Amendment violation was "obvious" that there need not be a materially similar case for the right to be clearly established).

Brosseau was decided two years after *Hope* and involved the application of the qualified immunity defense to an officer involved shooting case, noting that the facts of *Brosseau* were far from an obvious violation of the Constitution. This Court has repeatedly told courts not to define clearly established law at a high level of generality, further emphasizing that the specific factual context of a case is especially important in a Fourth Amendment case. *Mullenix v. Luna*, 577 U.S. 7, 12 (2015); *White v. Pauly*, 137 S.Ct. 548 (2017); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

The Eleventh Circuit panel opinion denied Deputy Lozada qualified immunity in finding that the facts of this case fit within this rare exception despite the fact that a United States District Court Judge, in ruling on a fully briefed motion for summary judgment, which was filed after extensive discovery, determined that Lozada's use of deadly force was reasonable as a matter of law, thus never reaching the issue of qualified immunity. Under such a circumstance, it defies logic to suggest that any reasonable officer in Deputy Lozada's shoes should have or would have known that the force used was unconstitutional where a Federal Judge did not reach a similar conclusion. Stated differently, where the facts of a case do not cause a Federal Judge to determine that an obvious violation of the Constitution occurred, how can the law expect a police officer to so conclude?

This Court should make clear that the obvious factual clarity rule cannot be applied by a Circuit Court to deny qualified immunity to a law enforcement officer in a Fourth Amendment excessive force case where the

District Court has determined that a particular use of force, when viewed in the appropriate manner, was reasonable as a matter of law, as police officers cannot be expected to understand the application of law to fact better than the Court does. This could be done by requiring an appellate court to demonstrate that the district court abused its discretion in its determination of reasonableness–a higher standard of review–which would give appropriate deference to the trial court's unique position in relation to the record evidence such as is the case in regard to evidentiary questions, where this Court has noted "a district court virtually always is in the better position to assess the admissibility of the evidence in the context of the particular case before it." *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 384 128 S. Ct. 1140, 1146, 170 L.Ed.2d 1 (2008).

III. THE ELEVENTH CIRCUIT PANEL'S DECISION IS WRONG

A. The Eleventh Circuit misapplied the *Graham* factors to the evidence and improperly judged Deputy Lozada's conduct in hindsight.

The Eleventh Circuit erred in drawing inferences from the undisputed facts which were both reasonable and unreasonable. Most notably, it did so when it determined that there was a material dispute in this case as to Mrs. Teel posing a threat to anyone other than herself in this matter. The panel stated: [c]ritically, however, we conclude that there is a genuine dispute as to whether Mrs. Teel posed a

significant, immediate threat to Officer Lozada's safety." (Pet. App. 1 at pg. 13).

It is important to note that the subject incident involved only two people: Mrs. Teel, who is now deceased and Deputy Lozada. There were no other eye witnesses and there was no video that captured the incident. As a result, Plaintiff Teel could not reasonably dispute Lozada's description of how Mrs. Teel held the knife. *Blackston v. Shook & Fletcher Insulation Co.*, 764 F.2d 1480, 1482 (11th Cir. 1985).

Furthermore, as noted by the trial court below citing to *Shaw v. City of Selma*, 884 F.3d 1093, 1100 (11th Cir. 2018),

> Plaintiff does not dispute that as Mrs. Teel walked toward Defendant Lozada, she kept the knife in her hand the entire time.... So long as Mrs. Teel was holding the knife the entire time, the position of the weapon did not matter." [R-59-8]. The *Shaw* case involved the use of deadly force upon a 74 year old mentally ill man armed with a hatchet. The Eleventh Circuit held in *Shaw* in affirming summary judgment in favor of the Defendants that:
>
> He was close to him-within a few feet-and was getting closer still, yelling at Williams to "Shoot it!" Shaw could have raised the hatchet in another second or two and struck Williams with it. Whether the hatchet was at Shaw's side, behind his back, or above his head doesn't change that fact. Given those circumstances, a

> reasonable officer could have believed that Shaw posed a threat of serious physical injury or death at that moment. A reasonable officer could have also concluded, as Williams apparently did, that the law did not require him to wait until the hatchet was being swung toward him before firing in self-defense.

Shaw, 884 F.3d at 1100.

The Eleventh Circuit's opinion here distinguished *Shaw* by stating: "viewing the evidence in the light most favorable to Dr. Teel, Officer Lozada had no prior information that Mrs. Teel may be aggressive and yet he shot her three times, without giving her any warning, from more than four times the distance in Shaw." (Pet. App. 1 at pg. 14, fn 8). However, this fails to take into account that once Deputy Lozada went upstairs to try to prevent Mrs. Teel from harming herself further, it quickly became apparent that she posed a threat not only to herself, but to Deputy Lozada as well. This was evidenced by both her body language (walking steadily with a knife raised toward a uniformed officer who had a gun pointed at her) and her words (which repeatedly and profanely demanded that he kill her). It was only then that Deputy Lozada shot Mrs. Teel. It was further undisputed that she never stopped approaching him nor did she drop the knife. As this Court has stated on more than one occasion: Deputy Lozada did not need to wait and hope for the best. *See Scott v. Harris*, 550 U.S. at 385, 127 S.Ct. at 1778. The law does not require officers in a tense and dangerous situation to wait until the moment a suspect uses a deadly weapon to act to stop

the suspect. As the Honorable Justice Oliver W. Holmes Jr. noted 100 years ago in *Brown v. United States*, 256 U.S. 335, 343, 41 S.Ct. 501, 65 L.Ed. 961 (1921): "[d]etached reflection cannot be demanded in the presence of an uplifted knife."

Furthermore, when Deputy Lozada first arrived at the Teel residence he met briefly with Dr. Teel and saw that he had blood stains on his clothing. Dr. Teel at that time told Lozada that his wife was armed with a knife, that she was trying to kill herself and that he had been unable to get the knife away from her. [R-29-1- pg. 8- lns. 12-21]. It would have been apparent to any reasonable officer in Deputy Lozada's position that Mrs. Teel was armed, uncooperative and potentially violent as she had already caused injuries to herself and had been successful in keeping her husband from taking the knife away from her. This is particularly true as Deputy Lozada knew she was impaired and suicidal.

The Eleventh Circuit also noted that Mrs. Teel was diminutive in size. (Pet. App. 1 at pg. 14). Here it was undisputed that Dr. Teel, who was a much larger individual that his wife, had been unable to get the knife away from Mrs. Teel which suggests notwithstanding her size, she was still a force to be reckoned with. Regardless, Mrs. Teel's size made the lethal weapon she held overhead no less sharp or dangerous. The Eleventh Circuit erred in not determining that Deputy Lozada's use of deadly force was objectively reasonable based upon what was known to him at the time of the subject incident. *See Mullenix*, *supra.*

The Eleventh Circuit relied too heavily on *Mercado v. City of Orlando*, 407 F.3d 1152 (11th Cir. 2005) which involved a suicidal person with a knife who was shot in the head with a sage launcher from a distance of six feet while he was still sitting on the ground while pointing a knife at his own heart and while making no threatening moves toward the officers. Mrs. Teel, on the other hand, while about ten feet away was on her feet approaching Lozada with a knife in her hand in a raised position demanding to be killed and continued to advance while armed even as she was being shot and as Lozada stepped back. The appellate court below made no mention of *Collar v. Austin*, 659 F. Appx. 557 (11th Cir. 2016) which in many material respects is strikingly similar to the present case as noted by the trial court:

> There, the decedent was similarly weak; he was a "naked, unarmed, impaired minor...."The decedent was also similarly insistent that the officer shoot and kill him; his only words were, "Shoot me" and "Kill me." *Id*. at *12. He also never reached for the officer or his gun. *Id*. Based on this behavior, Plaintiff's counsel argued that the decedent was "a threat only to himself." *Id*. Indeed, actions that show a person wants to be shot and killed seem to suggest that they have no interest in hurting the officer. However, the Eleventh Circuit found otherwise, reasoning that although judges might consider an officer's actions to be unreasonable "from the comfort and safety of our chambers . . . [w]e must see the situation through the eyes of the officer on the scene who is hampered by

> incomplete information and forced to make a split-second decision between action and inaction in circumstances where inaction could prove fatal." *Collar v. Austin*, 659 F. Appx. 557, 560 (11th Cir. 2016) (quotations omitted).
>
> Further, the officer in *Collar* never issued a warning before shooting the minor in the abdomen. *Id*. at *13. The Eleventh Circuit found that a jury could conclude that seconds before the defendant fired, he knew that another officer was nearby. *Collar*, 659 F. Appx. at 559. Neither of these facts swayed the court's reasoning.

(Pet. App. 21 at pg. 9).

The Eleventh Circuit's opinion that Mrs. Teel "was not actively resisting arrest, and there is no evidence that [she] struggled with" Officer Lozada and therefore a reasonable person could not determine that she posed any threat to officer Lozada is in direct conflict with the record evidence and any reasonable inferences derived therefrom. (Pet. App. 1 at pg. 15). It belies logic to state that a reasonable officer would not consider Susan Teel an immediate threat given the totality of the circumstances faced by Deputy Lozada in the brief moments prior to the use of force walking towards a law enforcement officer while holding a raised knife and uttering "Fuck you, kill me." *See Kisela v. Hughes*, 138 S.Ct. 1148, 200 L.Ed. 2d 449 (2018)(officer's shooting of a woman holding a large kitchen knife, when responding to 911 emergency call, did not violate clearly established law, thus officer was entitled to qualified immunity).

As part of its analysis, the Eleventh Circuit stated that Deputy Lozada "gave her no instruction or warning. He said nothing to her at all." (Pet. App. at pg. 5). However, this finding of fact discounts the undisputed evidence that the events happened quickly and Deputy Lozada said to Mrs. Teel, at the very least: "don't come." [R-39-4-pg. 3]. If anything, this supports Deputy Lozada's testimony that he did not have time to warn her that he was going to shoot her.

The Eleventh Circuit improperly rejected Deputy Lozada's testimony that Mrs. Teel was approaching him "in a threatening manner" and otherwise failed to judge the reasonableness of his use of deadly force from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight from the safety of judicial chambers. *City and County of San Francisco, Calif. v. Sheehan*, 575 U.S. 600 (2015); *see also*, *Mercado*, *supra*; *Cantu v. City of Dothan, Alabama*, 2020 WL 5270645 (11th Cir. 2020).

The Eleventh Circuit's opinion was also critical that Deputy Lozada did not retreat (although he did) or consider other less lethal uses of force. (Pet. App. 1 at pg. 14). However, this "should have, could have" type of analysis is a classic example of viewing an incident in hindsight, which is exactly how this Court has stated an officer's use of force should not be judged. *See Graham*, *supra.* An officer does not have to avoid the use of deadly force or exhaust all feasible alternatives to avoid the use of deadly force that is otherwise reasonable. *See Carr v. Tatangelo*, 338 F.3d 1259, 1270 (11th Cir. 2003) ("Reconsideration will nearly always reveal that something different could have been done

if the officer knew the future before it occurred. This is what we mean when we say we refuse to second-guess the officer." (internal citation omitted)); *see also Plakas v. Drinski*, 19 F.3d 1143 (7th Cir. 1994).

Furthermore, the law was not clearly established that Lozada had a duty under state or federal law to retreat or to attempt to use less than deadly force in a deadly force situation. *Terrell v. Smith*, 668 F.3d 1244, 1252-53 (11th Cir. 2012); *Penley v Eslinger*, 605 F.3d 843 (11th Cir. 2010). It was also not clearly established that Lozada had to give a warning before using deadly force in a situation where it is obvious by Mrs. Teel's statement asking to be killed, that she was aware of that possibility and yet she continued to advance while armed with a knife despite having several seconds to drop the knife. *Quiles v. City of Tampa Police Department*, 596 F.Appx. 816 (11th Cir. 2015).

Under the undisputed circumstances of this case, Mrs. Teel would have appeared to a reasonable officer in Lozada's shoes to be gravely dangerous. *See Penley*, 605 F.3d at 843. Consequently, the Eleventh Circuit's decision conflicts with the binding precedent of this Court, as well as its own precedent. *See Kisela*, *supra*; *Mullenix*, *supra*; *Brosseau*, *supra*.

B. The Eleventh Circuit engaged in reversible error in finding that Deputy Lozada is not entitled to Qualified Immunity under the unique facts of this case, despite the absence of factually similar case law, by application of the obvious factual clarity rule contrary to this Court's prior opinions.

As this Honorable Court has noted, "[q]ualified immunity is no immunity at all if 'clearly established' law can simply be defined as the right to be free from unreasonable searches and seizures." *City & County of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1776 (2015).

The Eleventh Circuit erred as a matter of law in finding that this case was an obvious clarity case in its justification for the denial of qualified immunity to Deputy Lozada. This Court has referred to the "obvious case" as a rarity. *See District of Columbia v. Wesby*, 138 S.Ct. 577, 590 (2018). This Court has also stated that "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." *Mullenix v. Luna*, 577 U.S. 7, 10, 136 S.Ct. 305, 308, 193 L.Ed.2d 255 (2015)(internal quotation marks omitted). 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. *Mullenix*, 136 S.Ct.

at 309 (internal quotation marks omitted and emphasis deleted). *Kisela*, 138 S.Ct. at 1152-1153. This Court has "repeatedly told courts ... not to define clearly established law at a high level of generality." *Mullenix*, 136 S.Ct. at 308; *Brosseau v. Haugen*, 543 U.S. 194 (2004)(the Court did not apply the obvious clarity standard for a Fourth Amendment shooting case citing *Hope v. Pelzer*, 536 U.S. 730 (2002)).

The Eleventh Circuit panel itself noted: "**under the unique circumstances of this case** it would be obviously clear to any reasonable officer that the display of force was excessive."(emphasis added) (Pet. App. 1 at pg. 19). However, as this Court has stated such "unique circumstances" should have been an important indication to the panel that Deputy Lozada's conduct did not violate a "clearly established" right. In *White v. Pauly*, 137 S.Ct. 548 (2017), this Court reversed the Tenth Circuit's affirmance of a lower court's denial of qualified immunity to an officer who had arrived late to an ongoing police action and who, having witnessed shots being fired by one of the suspects in a house which was surrounded by officers, shot and killed one of the suspects. In finding that the officer was entitled to qualified immunity, this Court stated:

> This is not a case where it is obvious that there was a violation of clearly established law under *Garner* and *Graham*. Of note, the majority did not conclude that White's conduct—such as his failure to shout a warning—constituted a run-of-the-mill Fourth Amendment violation. Indeed, it recognized that "this case presents **a**

> **unique set of facts and circumstances**" in light of White's late arrival on the scene. 814 F.3d, at 1077. **This alone should have been an important indication to the majority that White's conduct did not violate a "clearly established" right**.

White, 137 S.Ct. at 552 (emphasis added).

The Eleventh Circuit here improperly held this case to be an obvious clarity case when, ironically, the case law of the Eleventh Circuit such as *Mercado* and *Shaw* as well as this Court's precedent such as *Kisela* demonstrate that the governing law here is not "clearly established" much less obviously clear.

CONCLUSION

For the foregoing reasons, this Court should grant this petition and issue a writ of certiorari to review the judgment and opinion of the Eleventh Circuit Court of Appeals.

Respectfully submitted this 16th day of April, 2021.

SUMMER M. BARRANCO
Counsel of Record
RICHARD A. GUIFFREDA
PURDY, JOLLY, GIUFFREDA,
BARRANCO & JISA, P.A.
2455 East Sunrise Boulevard,
Suite 1216
Fort Lauderdale, Florida 33304
Telephone: (954) 462-3200
Telecopier: (954) 462-3861
summer@purdylaw.com
richard@purdylaw.com

Counsel for Petitioner