No. _____

In the
Supreme Court of the United States

SERGEANT GARY HEDGER, ET AL.,
Petitioners,

v.

RONALD GRAVES,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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October 19, 2020

QUESTIONS PRESENTED

Did the Sixth Circuit misapply or disregard this Court's precedent by holding that a law enforcement officer violates the Fourth Amendment and clearly established law by responding to perceived deadly force when arresting a violent, homicidal suspect who threatened officers with what appeared to be a weapon, consistent with the suspect's admitted intention of putting the officers in fear?

Did the Sixth Circuit improperly deny qualified immunity where an officer momentarily applies a taser in order to approach a noncompliant, violent, homicidal suspect who has been shot but has not been secured in order to disarm him?

PARTIES TO THE PROCEEDING

Petitioning the Court are Sgt. Gary Hedger, Kurt Potratz, and Charles Myers, individuals serving in their capacities as Deputies of Monroe County, Michigan. Petitioners were the Defendants and Appellees in the Sixth Circuit. Respondent, Ronald Graves, was the Plaintiff and Appellant below.

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The Opinion of the United States Court of Appeals for the Sixth Circuit is unpublished but can be found at 810 Fed Appx 414 (6th Cir. 2020). A copy of the Opinion is included in Petitioners' Appendix A at 1a-49a.

By Opinion and Order dated October 10, 2018, the Hon. Robert H. Cleland of the United States District Court for the Eastern District of Michigan granted summary judgment in favor of the Petitioners. (Appendix B, 50a-66a, Opinion and Order; Appendix C, 67a-68a, Judgment.)

JURISDICTION

The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§1254(1) and 2106. The United States Court of Appeals for the Sixth Circuit issued its Opinion on April 17, 2020. An Order Denying Rehearing was entered on May 20, 2020. This Petition for Writ of Certiorari is filed within 150 days of the latter date, pursuant to this Court's Administrative Order dated March 19, 2020 related to Covid-19.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend IV

> 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.

STATEMENT OF THE CASE

Plaintiff Ronnie Graves violently stabbed his grandmother Nancy Hammer with a large kitchen knife while inside her home in Erie, Michigan. Ms. Hammer, though severely injured, was able to escape Graves' attack. Deputies from the Monroe County Sheriff's Department responded and eventually located Graves inside the trailer sitting in a bathtub with his hands out of view. Graves failed or refused to comply with officer directives and then – admittedly attempting to scare the officers – suddenly made a threatening gesture, thrusting his hand up and forward, as though brandishing a weapon, while holding something dark in his hand and was shot. The undisputed facts established that the officers' actions were objectively reasonable in light of the circumstances confronting them. The district court analyzed applicable case law and granted summary in favor of the Defendants,

but the United States Court of Appeals for the Sixth Circuit improvidently reversed. Petitioners respectfully request that their Petition for Writ of Certiorari be granted or that the Sixth Circuit's decision be peremptorily reversed.

FACTS

On July 16, 2015, Nancy Hammer was discharged home after spending several days in the hospital following a heart attack. She returned to her home, Trailer #4 in the Oakwood Mobile Home Community in Erie, Michigan, which she shared with her grandson, Respondent Ronald "Ronnie" Graves. (R.25, MSJ, Exhibit 1, Hammer dep., pp. 37-38, 42-43, PG ID 212-213.)

Shortly after her arrival, Graves told Ms. Hammer he wanted to show her something. Ms. Hammer went into the bathroom, where Graves pointed at something at the bottom of the bathtub. When Ms. Hammer bent over to look at it, Graves violently stabbed her in the back of the head with an 8" kitchen knife. (Id., at 48-50, 52-54, PG ID 214-215; Exhibit 2, Incident Report 14-4031, p. 6, PG ID 226.)

Ms. Hammer was able to escape after wrestling away the knife blade, which separated from the handle during the struggle. Ms. Hammer exited the trailer and went to the neighbor at Trailer #5, occupied by Gary and Shannon Jones. Ms. Jones called 911, while Ms. Hammer explained to Mr. Jones what had happened. Ms.

Jones later retrieved the knife blade from outside Trailer #4 and put it in front of Trailer #5. (Id., Exhibit 1, pp. 55-56, 57-60, 62-64, PG ID 216-218; Exhibit 2, Incident 14-4031, pp. 5-6, PG ID 225-226.)

The initial contact to 911 occurred at approximately 6:11:31 pm, with a report that a 70-year old female was assaulted by her grandson "Ronnie" who was currently still inside Trailer 4. (Id., Exhibit 3, Dispatch CAD log, PG ID 283; Exhibit 4, Dispatch Transcript , pp. 1-2, PG ID 296-297.)[1]

Petitioners Sgt. Gary Hedger and Deputies Kurt Potratz, Craig Myers, and Melissa Crain all responded to the scene, along with both ambulance and local fire department / paramedics. Hedger was the first on scene, at approximately 6:32 pm. (R.25, Exhibit 5, Hedger dep., pp. 26-27, PG ID 316; Exhibit 3, Dispatch CAD log, PG ID 283.) By the time of his arrival, Ms. Hammer had already been transported by EMS. Monroe County Ambulance reported to Central Dispatch during the transport that there was a rumor of a possible second victim. (Id., Exhibit 4, Dispatch Transcript, pp. 5-6, PG ID 300-301.) Dispatch then relayed that information to Sgt. Hedger and the other officers. (Id., at 6, PG ID 301; Exhibit 5, Hedger, pp. 29, 45, PG ID 316, 319.)

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[1] The dispatch transcript was reviewed and corrected by Marc Gramlich, Director of Monroe County Central Dispatch. A copy of the audio was filed in the traditional manner below as Exhibit 9 to Defendants' motion and was provided to the Court of Appeals. (R.26, Exhibit 9, audio.)

Sgt. Hedger had some previous knowledge of Mr. Graves, including at least one prior suicide attempt. Dispatch relayed similar information to the officers, including "a long history of EDP, suicidal, mostly by knife. He did mention that he was going to blow his head off in one of the previous calls but that he did not have any guns." (Id., Exhibit 4, Dispatch Trans., p. 9, PG ID 304; Exhibit 5, Hedger dep., pp. 28-29, 45, 57, PG ID 316, 319, 322.)

The Joneses advised Hedger that the knife blade had separated from the handle and Ms. Jones picked it up to prevent Graves from retrieving it; Crain secured the blade in her patrol vehicle upon her arrival. (Id., Exhibit 5, pp. 34-36, PG ID 317.) Hedger was also advised that Graves had been delusional that day and had been walking around the trailer park talking to himself. (Id., Exhibit 5, p. 38, PG ID 318.)

Deputies Potratz and Myers arrived after Hedger and Crain. Potratz armed himself with his department issued rifle. (Id., Exhibit 7, Potratz dep., p. 62, PG ID 334.) Crain and Myers armed themselves with their handguns. (Id., Exhibit 8, Myers at 72, PG ID 344; Exhibit 6, Crain at 40-41, PG ID 330-331.) Sgt. Hedger had his taser out if the opportunity and need arose for non-lethal force. (Id., Exhibit 5, Hedger at 49, PG ID 320.)

Deputy Potratz was stationed at the southwest corner of the trailer, near the rear door. The other officers knocked on the front door of the mobile home, identified themselves, and asked Graves to come out, to no avail. (Id., Exhibit 5,

Hedger at 57, PG ID 322.) Hedger, Crain and Myers entered and cleared the front portion of the cluttered trailer. (Id., at 53-54, PG ID 321-322; Exhibit 8, Myers at 72-75, 78, PG ID 344-346.) They then saw a narrow, trash-filled hallway and determined it unsafe for all of the officers to take that route to confront a potentially-armed suspect. (Id., Exhibit 5, Hedger, p. 54, PG ID 322.)

Myers remained in the front part of the trailer while Hedger and Crain exited. Hedger and Crain went around the trailer to pry open the rear door where Potratz was stationed. (Id., Exhibit 5, pp. 57-58, PG ID 322-323.)[2] Hedger retrieved a prybar from one of the first responder fireman on scene. (R.26, Exhibit 9, In-Dash video at 20:20.) Once the door was opened, the officers were able to see Graves sitting in the bathtub directly across the hallway from the door. (R.25, Exhibit 5, Hedger at 60, PG ID 323; R.26, Exhibit 9, In-Dash video at 21:09 ("In the tub, in the tub, right there."))

Hedger and Potratz could only see Graves from mid-chest line and up but could not see either of his hands. Graves was sitting in the center of the tub with his legs over the side of the bathtub. They could see from his knees down and from the

[2] Deputy Potratz's in-dash camera and body-mic recorded some of these events, though most of the event occurs off screen. The references to Exhibit 9, the in-dash video, refer to the time stamp of the 30:00 minute video, as opposed to the time that occasionally appears on screen, which corresponds with the actual clock time of the incident.

middle of his chest up, but not his hands. (R. 25, Exhibit 5, Hedger at 60, PG ID 323.)

The officers gave several commands for Graves to put his hands up over the next 30 seconds. (R.26, Exhibit 9, In-Dash video at 21:20 – 21:42.) Hedger pointed his taser at Graves, but due to the distance and the angle – Hedger was below the floor level since he was outside the trailer, and could only see part of Graves – he was not confident he could successfully deploy it. (R.25, Exhibit 5, Hedger at 65, PG ID 324.) Hedger and Crain went back inside while Potratz kept his rifle trained on Graves. (Id., Exhibit 5, at 65-69, PG ID 324-325; Exhibit 7, Potratz at 79-81, PG ID 335-336.) Mr. Graves did not move or respond to their commands at that time, but just stared ahead. (Id., Exhibit 7, Potratz at 84-85, PG ID 336-337; Exhibit 8, Myers at 101-104, PG ID 347.)

Myers proceeded down the hallway and saw Graves in the bathtub with his hand tucked behind his back and a blank, "murderous glare."[3] (Id., Exhibit 8, Myers at 134, PG ID 351.) As he got closer to the bathroom door, Myers encountered a small chair amongst the clutter. While moving the chair out of his way, his foot caught something and he stumbled so that the front portion of his body moved into the doorway. (Id., Exhibit 8, at 106-107, 109-113, PG ID 348-350.) Deputy Potratz

[3] Ms. Hammer, Graves' grandmother, similarly described Graves' "cold, dead eyes." (R.25, Exhibit 1, p. 87, PG ID 219.)

indicated that he still could not see Graves' hands. (R.26, Exhibit 9, In-Dash video at 20:42.) At that moment, Graves took his right hand and shot it up at him like he was drawing a gun and pointing it at Myers. (R.25, Exhibit 8, Myers at 113-114, PG ID 350.) Potratz also saw Graves quickly raising his hand toward Myers, holding what he perceived to be a weapon. (Id., Exhibit 7, Potratz at 89, PG ID 338.)[4]

Myers thought Graves was holding a handgun and was going to shoot him, so he fired one round toward Graves as he fell toward the back of the trailer. (Id., Exhibit 8, Myers at 114, PG ID 350.) Because Myers was in close proximity to Graves in the confined space – Potratz believed Graves was going to kill Myers. (Id., Exhibit 7, Potratz at 99, 115, PG ID 340-341.) In an effort to protect Myers, Potratz fired his rifle twice at Graves, hitting him in the lower right jaw with one shot. (Id., Potratz at 91-93, PG ID 338-339.) The shots were all fired within one-second, at the 20:42-20:43 mark of the in-dash video. Myers shouted, "Son of a bitch, not hit, not hit, shots fired!" (Exhibit 9, In-Dash video at 20:44-20:47.)

Hedger looked into the bathroom and observed Graves sitting in the same position. (R.25, Exhibit 5, Hedger at 71-73, PG ID 326.) He observed that Graves

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[4] In his deposition, Graves indicated he believed he was holding a comb. (See R.25, Exhibit 10, Graves at 175-176, PG ID 356.) However, he conceded that it could have been the knife handle in his hand, which is consistent with his admission to Michigan State Police Det/ Sgt. Michael Peterson. (Id., at 187, PG ID 358; Exhibit 2, MSP Report 14-4031, PG ID 260; Exhibit 11, Plaintiff's written responses to questions, PG ID 360.)

had been shot but could not see Graves' hands. Based on what had just occurred and believing Graves was armed and shot at Myers, Sgt. Hedger yelled for Graves to show his hands. (Id. at 73-74, PG ID 326.) Because Graves did not respond to his verbal commands, Hedger deployed his taser for five seconds, only long enough for Hedger to safely approach and disarm Graves. (Id., at 74-76, PG ID 327.) While searching Graves for a gun, Hedger discovered two broken pieces of a knife handle: one to the left of Graves and the other underneath him. (Id., at 76-77, PG ID 327.) Based on the in-dash video, the taser was deployed approximately five seconds after the shots were fired, and only one to two seconds after Myers shouted "not hit, shots fired!" (R.26, Exhibit 9, In-Dash video at 20:47-20:48.) Emergency medical personnel then entered to provide care for Graves.

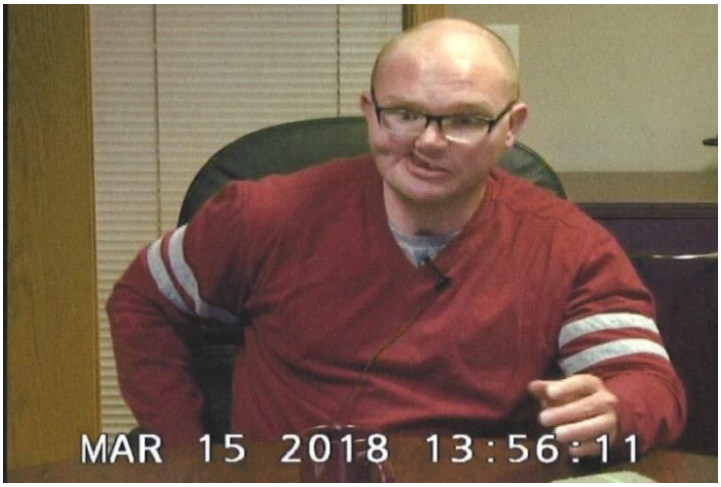
During his deposition, Graves re-enacted his actions the moment before he was shot, which he described as follows:

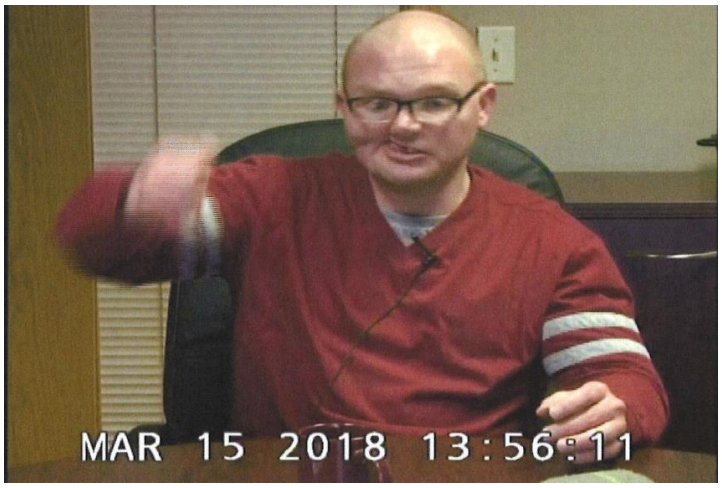
> A. I remember someone like, it seems like they were lunging and I raised my hand like this with a comb in my hand and then it was blackness.
> Q. Do you know for sure that it was a comb in your hand or are you speculating?
> A. I believe it was a comb.
> Q. Okay. You made a motion where you raised your right hand, but you had your hand when started that motion as if it was behind you, is that an accurate --
> A. It was on the side of me.
> Q. It was on the side of you?
> A. Yes.
>
> * * *
>
> Q. You pointed the comb. You moved your arm and pointed

the comb when you believed you saw someone lunging?
A. Yes.
Q. Why did you do that?
A. Because I wanted to scare them.

(R.25, Exhibit 10, Plaintiff's dep., pp. 175-176, PG ID 356.)

Fortunately, Graves' deposition was videoed. A copy of his re-enactment was included on Exhibit 9, the Dash-Cam video, identified as "Video Snippet." Several screen shots from his deposition depict his movement in the moment before the shots were fired and are included below in sequential order:





(R.25, Exhibit 12, PG ID 365-367.)

On July 21, 2015, Graves was questioned by Detective Sergeant Michael

Peterson of the Michigan State Police and after being Mirandized, he agreed to answer questions, which he did by written statements. (Id., Exhibit 2, at 21-26 of Supplement 2, PG ID 257-262; Exhibit 11, Plaintiff's written statements, PG ID 360.) In his statement, as he did in his deposition, Graves admitted that he pointed something at the officers trying to scare them away. He admitted that he was having delusions and was hallucinating. He believed that a group of people were coming to kill him and he did not know Defendants were officers. (See also, Exhibit 10, Plaintiff's dep., pp. 185-187, PG ID 357-358.) In his deposition, though, he admitted to hearing several people "barking" commands at him for approximately 30 seconds before he was shot. (Id., Exhibit 10, p. 169, PG ID 355.)

Graves was charged with assault with intent to murder his grandmother. He was referred to the Michigan Center for Psychiatry for determinations of both competency to stand trial and for a recommendation on criminal responsibility. (R.25, Exhibit 13, CFP competency report, PG ID 369; Exhibit 14, CFP responsibility report, PG ID 402.) The recommendations were that he was competent to stand trial, but the CFP examiner concluded:

> [I]t is this examiner's opinion that Mr. Graves had a substantial disorder of thought at the time of the alleged offenses, which rendered him mentally ill, as defined by statute. Additionally, as a result of this mental illness, he lacked substantial capacity to conform his conduct to the requirements of the law. Therefore, it is this examiner's opinion that available information supports a defense of legal insanity.

(Id., Exhibit 14, CFP responsibility report, p., 24, PG ID 425.) As a result of the CFP report, Graves was found not guilty by reason of insanity for the attempted murder of his grandmother and committed to the Center for Forensic Psychiatry.

PROCEDURAL HISTORY

Graves then filed this lawsuit. After the matter was fully briefed, the district court held that Defendants were entitled to qualified immunity where they did not violate Graves' Fourth Amendment rights or clearly established law which would have prohibited the use of force. As to the force by Myers and Potratz, the district court stated in pertinent part:

> Defendants arrived at the scene with the background knowledge conveyed by Dispatch. They knew the crime at issue was severe—Plaintiff had just repeatedly stabbed his 70-year-old grandmother. They were told that Plaintiff was emotionally disturbed, suicidal, and had a history with knives. While Plaintiff did not actively resist arrest, his disturbed state and threatening motion allowed for Defendants to perceive an imminent threat to their safety.
>
> Plaintiff has a hard time recalling that day due to his mental state at the time, but his testimony on these key points corroborates Defendants' version of events: (1) when Defendants located Plaintiff in the trailer, he was sitting sideways in the bath tub and his right hand was not visible to the officers (Dkt. #30-24, PageID 1742); (2) Plaintiff did not raise his arms or show his hands when repeatedly ordered to do so (Id., PageID 1736; Dkt. #30, PageID 443, 450); (3) Plaintiff raised his arm with a knife handle in it, holding it as if it were a knife, to scare Defendants (Dkt. #30-24, PageID 1753); (4) after he made

that motion, shots were fired, one of which hit Plaintiff in the face, and then Plaintiff was tasered (Id., PageID 1742–43). Furthermore, Plaintiff agrees that everything happened very quickly. (Dkt. #30, PageID 443).

Deputy Myers remained in the northerly portion of the trailer when the other officers exited and went to another door. After the others pried open another door and located Plaintiff, Sergeant Hedger ordered Myers to come down the cluttered hallway towards them. He did so and was positioned at the corner of the bathroom. A body microphone worn by Deputy Potratz recorded Deputy Myers repeatedly ordering Plaintiff to raise his hands so he could see them in the seconds before shots were fired. (Dkt. #30, PageID 446, 450). Myers recounts tripping in the cluttered hallway and then seeing Plaintiff raise his right hand from behind his back and point what appeared to be a pistol directly at his head. (Dkt. #30-10, PageID 1259–62). From Plaintiff's perspective, he remembers someone "lunging," which caused him to raise his arm holding the black plastic handle in his hand like a knife to scare them. (Dkt. #25-11, PageID 356). Myers fired his pistol at Plaintiff and fell to the floor. (Dkt. #30-10, PageID 1263).

While this was occurring, Deputy Potratz was standing outside the trailer door with his rifle aimed at Plaintiff. (Dkt. #30-8, PageID 1023). He was covering the other officers while they were inside. (Id., PageID 1024). He saw Plaintiff moving towards Deputy Myers with what he thought was a knife in his hand, which he believed was a threat to Myers' safety. (Id., PageID 1033–35). According to his deposition, he fired his gun because he thought Plaintiff was going to injure his partner. (Id., PageID 1034).

Plaintiff argues that case law clearly establishes the right of Plaintiff not to be shot in this situation. He cites cases where the use of lethal force was found unreasonable although the individual was armed with a knife. (Dkt. #30, PageID 463) (citing *Reed v. City of Modesto*, 122 F.Supp.

> 3d 967, 980 (E.D. Cali. 2015); *Zulock v. Shures*, 441 F. App'x 294, 302 (6th Cir. 2010)). The conclusions in these cases, however, are qualified with the factual caveats of the suspect "not advancing on the police officers" and "walking away." (Id.). Other cases Plaintiff does not cite have found probable cause to use lethal force in situations "[w]hen a person aims a weapon in a police officer's direction," *Greathouse v. Couch*, 433 Fed. App'x 370, 373 (6th Cir. 2011), and when an armed suspect in short range "could raise and fire a gun with little or no time for an officer to react." *Thomas*, 854 F.3d at 365–67.
>
> The Sixth Circuit has expressed that when an officer had good reason to think a suspect was armed his "decision to shoot under these circumstances was the archetype of a split-second decision to which we must defer." *Moore v. City of Memphis*, 853 F.3d 866, 872 (6th Cir. 2017). Likewise, the facts in this case are such that officers of reasonable competence could debate whether Defendants acted constitutionally when Plaintiff quickly raised and aimed a black item in his hand at an officer. Although Plaintiff was not actively resisting and did not in fact have a gun or knife with a blade in his hand at the time, he created the appearance of rapidly drawing a deadly weapon at one of the officers. App. 60a-73a.

As to Hedger's non-lethal use of force with the taser, the district court continued:

> While Defendant Hedger's employment of a taser against Plaintiff is viewed in the context of the constitutional boundaries clearly established by Sixth Circuit case law, these facts do not fit clearly into the paradigm established. Here, Defendant Hedger had asked Plaintiff to let him see his hands several times before his fellow officers fired shots. (Dkt. #30-3, PageID 564). Since he was positioned outside the trailer in such a way that he was not confident he could make an effective taser shot, Hedger was trying to move into the trailer to be in a better location. (Id.,

PageID 567–70). When he heard the shots go off and saw Myers fall, he thought Myers had been shot and that Plaintiff had a gun. (Id., PageID 573). While he saw that Plaintiff's "face was hanging off," (Id., PageID 575), it was still not clear to Hedger whether Plaintiff had a gun he could fire.

Hedger testifies that he again ordered Plaintiff to show his hands and when Plaintiff did not comply he tasered him. (Id., PageID 575–76). Plaintiff argues against this point, indicating that the orders cannot be heard on the Dashcam recording. (Dkt. #30, PageID 456). While this may be a genuine dispute, it is not material to the legal analysis. Indeed, in this situation, the question of whether and how Plaintiff was resisting or disobeying commands is not particularly helpful. Plaintiff admits that "Graves was unresponsive to the officers' commands over several minutes." (Id., PageID 468). When Plaintiff made his threatening gesture, however, officers of reasonable competence could find that he appeared to be a threat to officer safety (which justified the other Defendants' use of lethal force above). The legal question regarding Defendant Hedger, then, is whether he violated a clearly defined constitutional right by tasering Plaintiff seconds after he had already been shot.

Case law establishes that it is reasonable for an officer to continue to use force until they realize that a threat is clearly abated. *See, e.g.*, *Rush v. City of Lansing*, 644 Fed. Appx. 415, 422 (6th Cir. 2016) (quoting *Untalan v. City of Lorain*, 430 F.3d 312, 315 (6th Cir. 2005)) (noting that "[w]ithin a few seconds of reasonably perceiving a sufficient danger, officers may use deadly force even if in hindsight the facts show that the person threatened could have escaped unharmed.") For example, in *Mullins v. Cyranek* the Sixth Circuit held that employing deadly force five seconds after a threat had abated was still reasonable. *Mullins*, 805 F.3d at 768.

Based on the facts in this case, reasonably competent officers could disagree about whether it was constitutional

> to use non-deadly force (i.e., a taser) against a suspect five to seven seconds after he was already shot when he appeared to have a weapon. Therefore, no clearly established constitutional right was violated by Defendant Hedger and he, too, is entitled to qualified immunity. App. 64a-65a.

Plaintiff then appealed. A divided Sixth Circuit panel improperly reversed. While taking the facts in a light most favorable to Graves, the majority failed to view the incident from the perspective of a law enforcement officer on the scene. It disregarded this Court's precedents, and it shifted the burden of demonstrating a particularized, clearly established right from the Plaintiff to the Defendants. The majority further failed to resist the temptation of viewing the incident with 20/20 hindsight, as it ought not do. Lastly, it essentially held that a law enforcement officer, arresting a homicidal suspect, shortly after a violent attack, may not respond with potentially lethal force when the suspect points what appears to be a weapon at the officers while in close proximity. App. 2a-25a.

The dissenting opinion pointed out these errors and the improper qualified immunity analysis employed by the majority in reaching its conclusion. App. 26a-49a.

This Petition for Writ of Certiorari should be granted where the Sixth Circuit disregarded this Court's precedent and misapplied the law, clearly endangering officer and public safety. Petitioners' actions did not violate the Fourth Amendment or clearly established law. The district court's application of qualified immunity

should be reinstated, and the Sixth Circuit decision should be reversed.

ARGUMENTS FOR GRANTING WRIT

I. THE SIXTH CIRCUIT DISREGARDED SUPREME COURT PRECEDENT IN REVOKING QUALIFIED IMMUNITY GRANTED TO OFFICERS WHO REACTED TO PERCEIVED DEADLY FORCE WHILE ARRESTING A VIOLENT, HOMICIDAL SUSPECT WHO THREATENED OFFICERS WITH WHAT APPEARED TO BE A WEAPON, CONSISTENT WITH THE SUSPECT'S ADMITTED INTENTION OF PUTTING THE OFFICERS IN FEAR.

A. Qualified Immunity

The purpose of qualified immunity is to protect public officials from undue interference with their duties and from potentially disabling threats of liability. *Vakilian v Shaw*, 335 F3d 509, 516 (6th Cir. 2003.) "Because qualified immunity is an immunity from suit rather than a mere defense to liability ... it is effectively lost if a case is erroneously permitted to go to trial." *Pearson v Callahan*, 555 US 223, 231 (2009).

In determining whether qualified immunity applies, our courts employ a two-part test and consider: (1) whether a constitutional right has been violated, and (2) whether that right was clearly established. *Everson v Leis*, 556 F3d 484, 494 (6th Cir. 2009). Courts may address these prongs in any order, and either one may be dispositive. *Pearson*, *supra* at 236. The plaintiff bears the burden of showing that defendants are not entitled to qualified immunity. *Chappell v City of Cleveland*, 585

F3d 901, 907 (6th Cir. 2009).

While a generalized right to be free from excessive force is "clearly established," a more particularized inquiry is required, probing "whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*." *Saucier v Katz*, 533 US 194, 202 (2001), emphasis added. In *Plumhoff v Rickard,* 134 S Ct 2012 (2014), this Court stressed that "existing precedent must have placed the statutory or constitutional question confronted by the official *beyond debate*." Id., at 2023, emphasis added.

In *White v Pauly,* 580 US __, 137 S Ct 548 (2017), immunity was warranted where the lower court "failed to identify a case where an officer under similar circumstances ... was held to have violated the Fourth Amendment." *Id*., at 551-552. This Court reiterated:

> "[C]learly established law" should not be defined "at a high level of generality." As this Court explained decades ago, the clearly established law must be "particularized" to the facts of the case. Otherwise, "[p]laintiffs would be able to convert the rule of qualified immunity ... into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id*.

Adhering to the mandated particularized inquiry is even more important in cases alleging excessive force:

> 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, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.

City of Escondido, Cal. v Emmons, __ US __; 139 S Ct 500, 503 (Jan. 7, 2019), quoting *Kisela v Hughes*, 584 US __; 138 S Ct 1148, 1153 (2018). A body of relevant case law is usually necessary to clearly establish a particularized right. *Id*., at 504.

B. Lethal force

Lethal force is permissible when "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others. . ." *Tennessee v Garner*, 471 US 1, 11-12 (1985). While "incapable of precise definition," *Maryland v Pringle*, 540 US 366, 371 (2003), probable cause in this context exists when the facts and circumstances of which the officer is aware warrant a person of reasonable caution to believe that deadly force is necessary. *See Berger v New York*, 388 US 41, 55 (1967).

In determining whether an amount of force is reasonable requires a balancing of the nature and quality of the intrusion of the individual's Fourth Amendment interests against the countervailing governmental interest at stake. *Graham v Connor*, 490 US 386 (1989). The following factors are considered in evaluating reasonableness under the Fourth Amendment:

> (a) The severity of the crime at issue;
>
> (b) Whether the suspect poses an immediate threat to the safety of an officer or others; and,
>
> (c) Whether he or she is actively resisting or attempting to evade arrest by flight. *Graham*, *supra* at 396.

This is not an exhaustive list of factors, and the ultimate inquiry is whether the conduct was reasonable under the "totality of the circumstances." *Slusher v Carson*, 540 F3d 449, 455 (6th Cir. 2008).

In recognizing the dangers confronting law enforcement officers, the *Graham* Court observed:

> ***The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene*** rather than with 20/20 vision of hindsight ... the calculus of reasonableness must embody allowance for the fact that ***police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving*** -- about the amount of force that is necessary in a particular situation. *Graham*, at 396-397, emphasis added.

Graham cautioned against second-guessing an officer's on-scene judgment as to the

amount of force to use "even if it may later seem unnecessary in the peace of a judge's chambers." Id., at 396. Stated differently:

> [U]nder *Graham*, we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes "reasonable" action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.

Smith v Freland, 954 F2d 343, 347 (6th Cir. 1992).

After the relevant set of facts has been determined, "the question whether the defendant's actions were objectively unreasonable is a pure question of law." *Chappell, supra* at 909, quoting *Scott v Harris*, 550 US 372, 381 n. 8 (2007).

In reversing the grant of qualified immunity, the majority erred in multiple respects. First, in analogizing this case to *Sample v Bailey*, 409 F3d 689, 697 (6th Cir. 2005), the majority conceded, "True, in *Sample* the suspect's hands were empty, but that is a distinction without difference because, taking the facts in the light most favorable to Graves, the officers only perceived Graves to be holding an *inert object*." App. 17a, emphasis added. This conclusion is entirely contradicted by the record, and the fact that Graves' hands were *not* empty and he thrust the black object toward the officers as if he was drawing a weapon – consistent with the admitted intention to scare the officers – is a material, dispositive difference. The majority's reliance on *Sample* is inexplicable. As the dissent aptly observed, "No existing

precedent establishes that the use of lethal force under these circumstances is excessive," thereby warranting qualified immunity." App. 26a.

Not only did the majority consider the right at a high level of generality, its own restatement of the law highlights its glaring flaw. The majority stated: "the right of a criminal suspect 'not to be shot unless he [is] *perceived* to pose a *threat* to pursuing officers or to others' has been established since at least 1988. We clarified the breadth of this right in 2005: 'regardless of whether the incident took place at day or night, in a building or outside, whether the suspect is fleeing or found, armed or unarmed, intoxicated or sober, mentally unbalanced or sane, it is clearly established that a reasonable police officer may not shoot the suspect unless the suspect poses a *perceived threat* of serious physical harm to the officer or others. These factual distinctions between the cases do not alter the certainty about the law itself.'" App. 20a, emphasis added. The majority failed to heed acknowledge the *perceived* threat to the officers here.

Seconds after the shooting, Myers told his fellow officers, "He had a gun whatever it was." (R.30-15, Police Video Transcript, PG ID 1416.) While Hedger was searching Graves for the object that was in his hand, Myers reiterated, "It's a small handgun, right hand." (Id., PG ID 1417.) After Graves had been secured and Hedger confirmed that the object was a knife handle, Myers said, "Black is what I saw, black and coming right at me.... I could have swore [sic] it was just a little like

a Derringer almost. What it came across as." (Id., PG ID 1419–20.) Myers reiterated at his deposition that he had believed the object in Graves' hand was a gun. He testified, "From behind his back [Graves] came at me with a – what I perceived as a handgun, it was black handled with silver glint to the front of it." R.30-10, Myers dep., PG ID 1258, 1261 ("He took his right hand from behind his back and raised a black handled metal object with metal towards the front of it at me as if he was pointing a pistol directly at my head.... I believed it was a gun, yes, sir.... I believed it was a gun, sir").

Engaging in improper hindsight and assorted other errors, the majority rejected qualified immunity opining that 1) the object in Graves' hand was not a gun; 2) the object bore little likeness to a gun; and 3) Myers testified that he had no reason to believe the object was a gun.

First, the events unfolded rapidly, with Myers shooting when he saw what appeared to be a gun pointed at this head. Potratz fired in an attempt to protect Myers from Graves. The object was discovered not to have been a gun only *after* Hedger was able to search Graves and locate the knife's broken handle pieces. As the dissent noted, if the vision of hindsight is the proper calculus, "we would have to deny qualified immunity in every case in which police officers used lethal force against a suspect who turned out to be unarmed." App. 31a. *See*, *Mullins v Cyranek*, 805 F3d 760, 765, 767 (6th Cir. 2015), quoting *Malley v Briggs*, 475 US 335, 341 (1986) (fact

that plaintiff was actually unarmed is irrelevant to the reasonableness inquiry); *Sigman v Town of Chapel Hill*, 161 F3d 782, 792 (4th Cir. 1998); *Reese v Anderson*, 926 F2d 494, 501 (5th Cir. 1991). Reacting to the perceived deadly threat here is the epitome of a split-second decision, warranting deference to the officers on the scene. *See accord, Lemmon v City of Akron, Ohio*, 768 Fed Appx 410 (6th Cir. 2019) (officer had probable cause to believe suspect posed threat of serious harm to him and others such that deadly force was reasonable where suspect reportedly aided an armed robbery, fled the scene of the crime, and during a heated exchange with officers, refused to remove his hand from his waistband suggesting he had a firearm, dared officers to shoot him, dropped his bicycle, and took a step toward the officer); *Pollard v City of Columbus*, 780 F3d 395, 403 (6th Cir. 2015) (suspect posed serious and immediate threat where he engaged in a high-speed chase, lost consciousness, suddenly regained it, then made gestures suggesting he had a weapon).

In analyzing the majority's second point, the object's likeness to a gun, a photograph of the knife handle is in the record, revealing that the handle was black with silver metal rivets along the side. As the dissent pointed out, the physical evidence provides no reasonable basis to disbelieve Myers' testimony. According to Graves' argument, Myers was within six to eight feet of Graves and had only a fraction of a second to determine whether the black object brandished as a weapon was a gun. App. 32a-34a.

Finally, Myers testified that the black object Graves pointed toward him looked like a gun. As pointed out by the dissent, the majority erroneously relied on a portion of Myers' testimony discussing whether he knew if Graves had a gun *before* encountering him, not whether he perceived the black object to be a gun when he drew it on him. App. 29a-31a. Further, it is undisputed that neither Myers nor Potratz discharged a weapon until *after* Graves made the admittedly threatening gesture, consistent with his stated intent to "scare them."

Applying the *Graham* factors here, the crime at issue was severe. Graves lured his elderly grandmother into the bathroom and stabbed her repeatedly in the head, apparently attempting to kill her. He posed an immediate threat to the safety of the officers where he had been armed with a knife, it was not known if he possessed another knife or other weapon, he refused to comply with officers' directives to show his hands, and when Myers was in close proximity, he thrust his arm consistent with drawing a weapon while holding a black object in his hand, in a manner Graves admits was intended to be threatening to the officers. Finally, while he was not actively resisting or attempting to flee, Graves was noncompliant until he took the sudden, threatening action.

Likewise, Potratz' use of force was also objectively reasonable. He was faced with the same facts and circumstances confronting Myers. In addition, Potratz' discharge occurred in the split-second after he believed his partner, Myers, was in

mortal danger. Such a decision is entitled to deference, in light of the rapidly-evolving and dangerous situation. Like Myers, it is undisputed that Potratz did not discharge his weapon until after Graves intentionally threatened Myers. It also cannot be ignored that two officers from different vantage points witnessed the same threatening action and responded the same way. While Graves ultimately did not possess a deadly weapon at the time force was used, qualified immunity applies to protect officers where their mistake is one of fact – and should most certainly apply here where the mistake in fact is the direct result of Graves' deliberate act of threatening them. The majority improperly discounted the seriousness of the threat perceived by Potratz. See App. 37a-41a.

A proper application of qualified immunity leads to the inexorable conclusion that each of the individual officer's decisions to use force was reasonable under the circumstances. Moreover, as detailed earlier, use of 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 v Luna*, 577 US —; 136 S Ct 305, 308-309 (2015). Graves was required to provide precedent where an officer acting under similar circumstances as Sgt. Hedger, Deputy Myers, and Deputy Potratz was held to have violated the Fourth Amendment. This he failed to do.

II. THE SIXTH CIRCUIT IMPROPERLY DENIED QUALIFIED IMMUNITY WHERE SGT. HEDGER MOMENTARILY APPLIED A TASER IN ORDER TO APPROACH GRAVES AND DISARM HIM.

As the dissent correctly observed, Sgt. Hedger's deployment of the taser is not even a close question. App. 41a-48a. Tasers carry "a significantly lower risk of injury than physical force" and that the vast majority of individuals subjected to a taser - 99.7% - suffer no injury or only a mild injury. *Hagans v Franklin County Sheriff's Office*, 695 F3d 505, 510 (6th Cir. 2012), quoting John H. Laub, Director, Nat'l Inst. of Justice, *Study of Deaths Following Electro Muscular Disruption* 31 (2011).

Sgt. Hedger deployed his taser only five seconds after Graves made his admittedly threatening movement and the shots were fired, and less than two seconds after Myers, already on the ground, shouted out "not hit, shots fired!" The situation was tense and rapidly evolving. When Hedger observed Graves, he could not see his hands, he was unable to determine if Graves still possessed a weapon or had easy access to it, and despite Graves being shot, Hedger was unable to determine whether the threat had clearly abated. While he did not directly witness Graves' threatening gesture, he was aware of all of the other facts known by Myers and Potratz. He was also specifically informed by Myers that he was not hit, but shots were fired, which a reasonable officer could interpret as shots having been fired by Graves at Myers. He had only a split-second to make a decision, and chose to deploy his taser to

immobilize Graves in order to get close enough to disarm him, locate any weapons, and secure him. In *City and County of San Francisco v Sheehan*, 575 US __; 135 S Ct 1765, 1777 (2015), this Court held that officers were justified in using potentially deadly force in responding to the plaintiff there. Although this Court noted that there was a dispute regarding whether the plaintiff was on the ground when the last shot was fired, it deemed the dispute immaterial because even if she "was on the ground, she was certainly not subdued." *Id.*, at 1780 n2.

By parity of reasoning, the use of debilitating, non-deadly force in this case to secure and disarm Graves was objectively reasonable. Though Plaintiff had been shot in the jaw, Hedger had no way to know if Graves still possessed a weapon and could use it to harm Hedger if he approached him. Moreover, Graves failed to present case law demonstrating that deploying the taser only until Hedger could disarm Graves violated a clearly established right. In light of *Sheehan, supra*, a reasonable officer could have concluded that the perceived threat had not entirely abated in the seconds after the shots were fired. See also, *Untalan v City of Lorain*, 430 F3d 312, 315 (6th Cir. 2005) (deadly force was reasonable where officer shot suspect who had dropped a knife he used to threaten officers, stating "[w]ithin a few seconds of reasonably perceiving a sufficient danger, officers may use deadly force even if in hindsight the facts show that the persons threatened could have escaped unharmed").

As previously briefed, specificity is especially important in the Fourth Amendment context. See *Emmons*, *supra*; *Mullenix v Luna*, 577 US —; 136 S Ct 305, 308 (2015). Use of 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*, at 309. It is *Plaintiff's* burden to provide clearly established law forbidding the challenged action. In *White*, *supra*, this Court reversed a denial of qualified immunity in a deadly force case and cautioned lower courts against defining "clearly established rights" too broadly:

> In the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases. *See, e.g., City and County of San Francisco v. Sheehan*, 575 U. S. ___, ___, n. 3 (2015) (slip op., at 10, n.3) (collecting cases). The Court has found this necessary both because qualified immunity is important to "'society as a whole,'" ibid., and because as "'an immunity from suit,'" qualified immunity "'is effectively lost if a case is erroneously permitted to go to trial,'" *Pearson* [, *supra*].
>
> Today, it is again necessary to reiterate the longstanding principle that "clearly established law" should not be defined "at a high level of generality." *Ashcroft v. al-Kidd*, 563 U. S. 731, 742 (2011). As this Court explained decades ago, the clearly established law must be "particularized" to the facts of the case. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Otherwise, "[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id*., at 639.

> *The panel majority misunderstood the "clearly established" analysis: It failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment*.

White, *supra*, emphasis added; see also, *Kisela v Hughes*, __ US __, 138 S Ct 1148 (2018) stressing the importance of evaluating a use of force based upon the specific circumstances confronting the officer when determining whether conduct was clearly forbidden. In order to be "clearly established," existing precedent must have placed the constitutional question "beyond debate." Id., at 1152-1153. Graves failed to carry his burden in this regard.

The Sixth Circuit erred in rescinding the qualified immunity granted by the district court where the force used was objectively reasonable under the circumstances confronting the officers and did not violate clearly established law. Graves reportedly had attempted to murder his grandmother. Graves, found inside a bathtub, ignored or refused to comply with numerous commands, and instead, quickly lifted his right arm and pointed a small black object at the officers, admittedly intending to scare them, which he accomplished. Only *after* Plaintiff made this threatening gesture did Deputies Myers and Potratz fire their weapons. They reasonably responded in a split second to what they perceived as a threat. Seconds later, Sgt. Hedger acted reasonably in deploying his taser to abate any further threat until the suspected weapon could be located and Plaintiff secured. These reasonable actions did not violate the Fourth Amendment or clearly

established law.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that their Petition for Writ of Certiorari be granted or the Sixth Circuit decision be peremptorily reversed.

Respectfully submitted,

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Dated: October 19, 2020