No. _____

In The
Supreme Court of the United States

KENNETH KNOWLES,
Individually and as Administrator of the
Estate of Lori Renee Knowles, Deceased,

Petitioner,

v.

OFFICER JASON MICHAEL HART,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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December 17, 2020

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QUESTIONS PRESENTED

1. Does the Fourth Amendment authorize a police officer to use deadly force against a citizen exercising her Second Amendment right to wear a holstered, licensed handgun inside her own home when it is undisputed that the gun never left its holster and there is a factual dispute as to whether she reached for it when the officer unexpectedly entered her bedroom in response to a 911 ambulance call?

2. Does the Fourth Amendment authorize the use of deadly force against someone in mere possession of a handgun which is holstered and has not yet been drawn, raised, or brandished in a threatening manner?

3. Does 28 U.S.C. §1367 require a district court to weigh the factors set forth in *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715 (1966) – and to articulate the process by which it weighed such factors – in exercising discretion to retain supplemental jurisdiction over state law claims after all federal claims have been dismissed when there are substantive differences between state and federal law, and the interests of federalism dictate that state courts be the ultimate arbiter of state law questions?

PARTIES TO THE PROCEEDINGS

Petitioner, Kenneth R. Knowles, who brought this action in both his individual capacity as surviving spouse of Lori Knowles and as administrator of her estate, was the appellant in the court below. Respondent, Officer Jason Michael Hart, was the appellee in the court below.

RELATED CASES

- *Knowles v. Hart*, No. 16SV669EDB (PeachCourt #STSV2016000669)
  State Court of Henry County, Georgia
  Dismissed without prejudice October 5, 2017
- *Knowles v. Hart*, No. 1:18-cv-01394-SDG
  U.S. District Court for the Northern District of Georgia
  Judgment entered April 3, 2020
- *Knowles v. Hart*, No. 20-11389
  U.S. Court of Appeals for the Eleventh Circuit
  Judgment entered August 28, 2020

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Petitioner, a licensed pawnbroker and firearms dealer whose wife carried a holstered and permitted handgun in an "open carry" state, filed this lawsuit against the police officer who unexpectedly walked into her bedroom and shot her while she was waiting for an ambulance, alleging a Fourth Amendment violation for excessive force under 42 U.S.C. §1983 and pendent state tort claims for battery and negligence.[1] At the close of discovery, the district court granted summary judgment to Respondent on all claims – including state law claims that Petitioner submits should have been dismissed without prejudice so that they could be adjudicated in the state court where they were originally filed. (App. 11). Petitioner appealed the grant of summary judgment to the Court of Appeals for the Eleventh Circuit, which affirmed the trial court order just three weeks after the close of briefing. (App. 1). Petitioner filed a petition for rehearing *en banc* which was denied. (App. 37).

[1] The case was originally filed in state court with state law claims only, but that action was voluntarily dismissed and refiled in federal court after the Eleventh Circuit decided *Turk v. Bergman*, 685 F. App'x 785 (11th Cir. 2017), which involved materially similar facts and established a clear basis for adding a Fourth Amendment claim and invoking federal jurisdiction.

JURISDICTION

The decision of the Court of Appeals denying the petition for rehearing was issued on October 5, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely filed under 28 U.S.C. § 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated . . . "

United States Constitution, Amendment II:

> " . . . [T]he right of the people to keep and bear Arms, shall not be infringed."

42 U.S.C. §1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . 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 . . . "

28 U.S.C. §1367(c):

> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if –
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

STATEMENT OF THE CASE

Lori Knowles called 911 because she believed she had taken too much of her prescribed medication. Waiting in her bedroom for an ambulance to arrive at her suburban home, she expected paramedics to knock at the door – not armed police officers to let themselves in. Her husband, Kenneth Knowles, owned a pawnshop and is a licensed firearms dealer who, ironically, had many Henry County police officers as customers. In accordance with the Second Amendment and the open-carry permit issued in her name, Lori was wearing a pistol in a holster in the privacy of her own home

when Officer Hart and another Henry County officer responded to the 911 call and saw her lying in bed with the gun in her holster. What happened next is in dispute, but it culminated with Lori being shot by Officer Hart and dying shortly thereafter.

There is one fact upon which all parties agree: Lori Knowles never took the gun from her holster, and the gun remained in her holster the entire time until the officers unholstered it – which was not until *after* she was shot and handcuffed. But when it comes to explaining why Officer Hart shot a woman in medical distress who was in lawful possession of a holstered firearm in her own home, his story is slightly different each time it is told.

According to the official incident report by Officer Hart's supervisor, when the supervisor arrived and Hart "was coming out of the residence . . . Hart stated that Mrs. Knowles refused his verbal commands and said 'Fuck You' and **began trying to get her pistol out of the holster on her hip**. . . ."[2] However, that is not what Hart said in either his deposition testimony or in any of his written or recorded statements, which

[2] Petitioner has added bold print to quotations throughout this section to emphasize disparities in testimony and highlight facts that raise a jury question. As for the "f*** you" statement allegedly made by Mrs. Knowles in this particular version of Hart's story, the court below selectively chose not only to adopt that version, but to turn up the volume so that she was "screaming" it, when putting its lopsided spin on facts that it was required to view in the light most favorable to plaintiff, thereby implying that Mrs. Knowles had verbally threatened the officers when a proper view of the evidence would show that she never posed an imminent lethal threat. (App. 2).

is one of several inconsistencies casting a shadow upon his credibility. Hart also spoke to a paramedic at the scene, who reported that "PD [police department] advised **she had pointed a gun at them and that he had shot her**." Both of these statements were spontaneous utterances made by Hart within minutes after the shooting.

In a supplemental report the following day, Hart wrote that "**I observed her several times reaching down at her waistband** where the handgun was located." That implies that she reached toward the gun several times without touching it, which strains credibility because it does not make sense that he would allow her to do it several times before shooting her. If so, a jury might ask why the final alleged "reach" justified the use of deadly force if the first few did not?

In a recorded statement to the Georgia Bureau of Investigation (GBI) that was also done the day after the shooting, Hart gave a slightly different account:

> As soon as I saw her, the black paddle holster and a firearm on her right side, at that time I told Officer Goetz "gun," I said "she's got a gun." . . . As soon as I told him "gun" and I drew my gun out, I said "Ma'am, show me your hands, show me your hands," at which time she looked up like surprise and saw me. She had this look on her face that was just, the only way I can describe it in my own words was evil, I mean she just had a really mean look on her face. I cannot describe it. At which

> time she came off the bed. **I noticed her right hand going down *toward* the gun.**

When asked to explain the above account in his deposition, Hart said: "I said 'show me your hands' because **I could not see her hands, but I could see the gun in the paddle holster**." But if he could see the gun in the holster but *not* see her hands, how credible is it when he says that she was reaching toward the holster? Reasonable jurors could infer that he did not shoot her because she was reaching for a gun, but simply because she *had* a gun. That inference is supported by the following portion of Hart's statement to the GBI:

> Then she, when she kept reaching down, that's when she bladed to me and **acted like she was going into the corner, like she was gonna get her gun out and take cover and start shooting. That's what I thought.**

This statement authorizes an inference that she was only a potential threat, not an imminent one.

By analogy, that is the difference between a driver on a traffic stop who pulls a gun out of the glove compartment and one who has a gun simply lying on the passenger seat in plain view. The first suspect is an imminent threat; the second is not. Hart's "thought" that deadly force was called for when Knowles "acted like she was *going* into the corner, like she was *gonna* get her gun out and take cover and start shooting" is speculative and future tense – not a present and immediate

danger. A jury could find that Hart's subjective fear of what he "thought" she was "gonna" do was not an objectively reasonable basis for using deadly force at that moment, and that a reasonable officer would not have overreacted in that situation – particularly when aided by expert testimony to that effect.

Hart also claims that Mrs. Knowles "bladed" herself in a "fighting position" when she got off the bed. That is tactical lingo meaning that she turned her body sideways toward Hart, which is just as easily construed as a defensive posture to provide a smaller target for someone pointing a gun at her – or as a natural position for someone who has just stepped out of a bed and is standing parallel to the bed, which would be perpendicular to Hart's vantage point. The jury could reason that a true "fighting position" would have been to draw the gun and point it at Hart, which never happened, or to advance toward him rather than backing away. As the Court made clear in *Tolan v. Cotton*, 572 U.S. 650 (2014), the moving party on summary judgment is entitled to no favorable inferences whatsoever, and the only reasonable inferences that can be drawn are those favorable to the plaintiff. A jury could find that she was not "bladed" at all based on expert testimony that such a position was inconsistent with the physical evidence, but even if she was, Hart still does not dispute that her gun never left the holster.

Petitioner's expert, William Harmening, is a former law enforcement officer, police academy instructor, and professor of criminology and forensic psychology who has investigated and reconstructed many police

shootings. In his report, Harmening makes the following observation:

> It is also interesting that Hart fired only once, and refrained from shooting again even when he thought he had missed. Police officers are trained to shoot until the threat has ended. Certainly, especially **if he truly believed he had missed**, there was nothing that would have led Hart to believe that the threat ended after one shot.

If Hart were justified in shooting and missed, then he should have shot her again – unless he realized he had made a bad judgment the first time. At the very least, the fact that he did not shoot again after he thought he had missed authorizes the inference that there was no justification for the use of deadly force, and if there was no justification for a second shot there was arguably no justification for the first. Either way, the gun remained in her holster the entire time, and if she was not a lethal threat when she was struggling with the officers with a gun in her holster after she was shot, then she was certainly not a lethal threat when the gun was in her holster before she was shot.

Most significantly, the fact that Hart and the other officer went hands-on to subdue Lori Knowles *after* the shot was fired shows that they could have done the same thing before the shot, when she was closer to them and not yet putting up a struggle. If there was no necessity to take the gun from her holster until after they had handcuffed her, what was the necessity for

shooting her before that? All the above facts and inferences led Petitioner's expert to one conclusion:

> Based on the above analysis, it is reasonable to conclude that in the context of accepted police training and standards of practice, the actions of Officer Hart – including the use of deadly force against Lori Knowles – were excessive and unreasonable under the circumstances.

But the courts below refused to credit that expert opinion, just as they refused to acknowledge inconsistencies in testimony, discrepancies between the officers' accounts and the physical evidence, and conflicting inferences which should have been submitted for jury resolution. The Court's mandate in *Tolan v. Cotton* is simply not being followed in the Eleventh Circuit, and this case is but one example.

REASONS FOR GRANTING THE PETITION

A. This Court needs to clarify the law on when, if ever, mere possession of a lethal weapon that is not being used in a threatening manner is justification for the use of deadly force.

The consensus view of those circuits which have decided the question is that mere possession of a firearm, protected by the Second Amendment and state "open carry" laws such as O.C.G.A. §16-11-126, is not itself a sufficiently lethal threat to authorize the use

of deadly force under the Fourth Amendment reasonableness standard announced by *Tennessee v. Garner*, 471 U.S. 1 (1985) and *Graham v. Connor*, 490 U.S. 386 (1989) more than three decades ago. The Eleventh Circuit decision that is the subject of this Petition is clearly contrary to that consensus.

For example, the Sixth Circuit held in *King v. Taylor*, 694 F.3d 650, 653, 662-63 (6th Cir. 2012) that it was unreasonable to use deadly force against a suspect who was holding a gun if he "did not point [the] gun towards the officers just before he was shot" – despite the fact that he had earlier threatened to "kill someone today." That is consistent with that court's prior decision in *Brandenburg v. Cureton*, 882 F.2d 211, 213, 215 (6th Cir. 1989) that an officer's use of deadly force against suspect who had previously threatened to kill the officer and fired warning shots at him could be found unreasonable if it were true that the suspect "was not grasping the trigger" or "aiming his weapon" at the officer when he was shot. The Ninth Circuit has similarly noted that officers' use of deadly force would be objectively unreasonable if it were true that, although the individual held a gun, he had the gun "trained on the ground" and did not make a "furtive movement, harrowing gesture, or serious verbal threat" before being shot. *George v. Morris*, 736 F.3d 829, 838-39 (9th Cir. 2013) (O'Scannlain, J.). Most recently, the Eighth Circuit adopted the same rule, collecting the above cases and others from various jurisdictions. *Cole Estate of Richards v. Hutchins*, No.

19-1399, 2020 WL 2758694 at *5 (8th Cir. May 28, 2020).

The Eighth Circuit decision in *Cole* even cited one Eleventh Circuit case for the same principle, but the court below summarily dismissed that case and similar decisions despite their material similarity to the facts of this case. *Perez v. Suszczynski*, 809 F.3d 1213, 1220 (11th Cir. 2016) ("[T]he mere presence of a gun or other weapon is not enough to warrant the exercise of deadly force and shield an officer from suit. Where the weapon was . . . and what was happening with the weapon are all inquiries crucial to the reasonableness determination. . . . [T]he ultimate determination depends on the risk presented, evaluating the totality of the circumstances surrounding the weapon."); *see also Weiland v. Palm Beach Cty. Sheriff's Office*, 792 F.3d 1313, 1326-27 (11th Cir. 2015) (shotgun in lap of man who, like Knowles, had bipolar disorder); *Turk v. Bergman*, 685 F. App'x 785, 788-89 (11th Cir. 2017) (gun lying on car seat next to driver);[3] *Mercado v. City of Orlando*, 407 F.3d 1152, 1154, 1158 (11th Cir. 2005) (suicidal person holding knife who ignored commands to drop the knife but made no threatening moves); *Gilmere v. City of Atlanta*, 774 F.2d 1495 (11th Cir. 1985) *(en banc)* (resisting suspect lunged for officer's

[3] Although *Weiland* and *Turk* were decided after the subject incident, the shootings in those cases predated the one in this case, so they are properly cited to show that the law was already clearly established by earlier case law. Since the officers in those cases were not entitled to qualified immunity for shootings that happened prior to the shooting in the instant case, neither is Officer Hart.

gun but did not gain control of it). The fact that the Eleventh Circuit was unwilling to accept that these decisions – along with a robust consensus of authority from other circuits – as clearly establishing the law for purposes of this case is all the more reason for the Court to grant certiorari and provide the needed clarification.

If certiorari is granted, reversal of the summary judgment order would be mandated by applying what should be a clearly established rule to the facts of this case. Given the discrepancies in Hart's statements and the inconsistencies between his testimony, the physical evidence, and the expert's analysis, the facts should have been evaluated by a jury. In any event, since there is no dispute that Mrs. Knowles' gun never left its holster, the court below should have denied qualified immunity under the clearly established rule articulated by the above line of cases.

The trial court glossed over disparities in the officers' testimony because they were not completely contradictory, but it is not the function of the Court to distill the record in search of explanations which would explain all factual inconsistencies. The tasks of weighing evidence, reconciling conflicts, and determining whether disparities in testimony are overcome by facts upon which the witnesses do agree, is the sole province of the jury. That is particularly true when the Petitioner's decedent is unable to rebut the officers' testimony due to her failure to outlive the encounter, which means that there is no counterbalancing narrative to

compare to the officers' self-serving version of the facts.

The self-serving testimony of Officer Hart that Mrs. Knowles was "reaching" toward a securely holstered firearm is not entitled to credit on summary judgment. *See Hinson v. Bias*, 927 F.3d 1103, 1118 (11th Cir. 2019) ("we cannot credit an officer's version of events just because a plaintiff cannot personally rebut it"); *Abraham v. Raso*, 183 F.3d 279 (3d Cir. 1999) ("since the victim of deadly force is unable to testify, courts should be cautious on summary judgment to ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story – the person shot dead – is unable to testify); *Plakas v. Drinski*, 19 F.3d 1143, 1147 (7th Cir. 1994) ("particular care" required before summary judgment can be granted "where the officer defendant is the only witness left alive to testify"). The jury could choose to disbelieve that testimony, or they could believe it but still find that the alleged "reach" was not a sufficiently immediate lethal threat to justify shooting her at that moment in time. *See*, *generally*, *Tolan v. Cotton*, 572 U.S. 650 (2014) (since qualified immunity cases illustrate the importance of drawing inferences in favor of the non-movant, the lower court should have acknowledged and credited Tolan's evidence with regard to lighting, demeanor, words spoken, and positioning rather than simply accepting the officer's account).

B. 28 U.S.C. §1367 requires a district court to exercise its discretion – and to articulate the process by which such factors were weighed in the course of that exercise – in deciding whether to retain or decline supplemental jurisdiction over state law claims after all federal claims are dismissed pretrial, especially when there are substantive differences between state and federal law, and the interests of federalism dictate that state courts be the ultimate arbiter of state law.

Petitioner respectfully submits that the trial court erred by taking up the state law claims at all once it made the decision to grant summary judgment on the Fourth Amendment claim. This Court has instructed the federal courts deciding whether to exercise supplemental jurisdiction over a state law claim – after all the federal claims in the case have been dismissed – to consider these four factors: comity, convenience, fairness, and judicial economy in deciding whether to retain jurisdiction to decide the state law claims. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966). Based upon *Gibbs* and the language of 28 U.S.C. §1367(c), the Eleventh Circuit has recognized that state law claims should generally be dismissed for lack of jurisdiction where all federal claims are dismissed pretrial, but it declined to follow that rule in this case. *Estate of Owens v. GEO Grp., Inc.*, 660 F. App'x 763, 775 (11th Cir. 2016).

While a trial court's exercise of supplemental jurisdiction over state law claims under 28 U.S.C. §1367 is reviewed only for an abuse of discretion, the Eleventh Circuit has held that "[w]e decide pure law issues *de novo*, which is another way of saying that a ruling based on an error of law is an abuse of discretion." *Ewing Indus. Corp. v. Bob Wines Nursery, Inc.*, 795 F.3d 1324, 1326 (11th Cir. 2015) (*quoting Young v. New Process Steel, LP*, 419 F.3d 1201, 1203 (11th Cir. 2005) (internal cites omitted). The misapplication of Georgia law in this case was a pure error of law. Moreover, there is nothing in the language of the trial which indicates that the trial court engaged in the exercise of discretion by actually weighing the *Gibbs* factors or other salient concerns. It is axiomatic that it is an abuse of discretion where "the trial court fails to exercise its discretion." *Whiteman v. Pitrie*, 220 F.2d 914, 918 (5th Cir. 1955). In other words, the court below abused its discretion under §1367 by not weighing the factors at all.

Under *Estate of Owens*, the Eleventh Circuit announced a policy that state law claims should generally be dismissed for lack of jurisdiction where all the federal claims are dismissed pretrial, but it failed to enforce that policy in this case. That policy should not only be enforced in this case, but it should be adopted by the Court as the presumptive nationwide policy under §1367(c) unless it is outweighed by other *Gibbs* factors. Said policy notwithstanding, however, dismissal of the state claims without prejudice was mandated by the substantive differences between the state and federal law at issue.

With regard to the pendent state law claims, the Court of Appeals misconstrued both the deadly force standard and the official immunity defense under Georgia law. Unlike the Fourth Amendment standard of objective reasonableness, Georgia law requires that deadly force not only be reasonable, but that it also be "necessary" for the defense of self or others. O.C.G.A. §16-3-21(a). In other words, if there were available alternatives other than the use of deadly force – as stated by Petitioner's expert – then the shooting would be a tort under Georgia law even if it were subject to qualified immunity under the Fourth Amendment. (R. 10-1). The court below glossed over that distinction.

The court below also misconstrued the Georgia Supreme Court's application of official immunity to deadly force cases in *Kidd v. Coates*, 271 Ga. 33, 34, 518 S.E. 2d 124 (1999). In *Kidd*, the Georgia Supreme Court made clear that the defense of official immunity does not apply where an officer shoots someone intentionally *and* without justification – irrespective of their subjective feelings when doing so – presumably because the officer is charged with knowledge of what constitutes justification to take a life, and a deliberate decision to take such action is sufficient to infer malice in the eyes of the state's highest court when interpreting arcane principles of its own state's law.

> Under this definition, an officer who, in the performance of his official duties, shoots another in self-defense is shielded from tort liability by the doctrine of official immunity. One who acts in self-defense does not act with the

> tortious intent to harm another, but does so for the non-tortious purpose of defending himself. OCGA § 51-11-1 . . . **Thus, if Appellees shot Gaddis intentionally and without justification, then they acted solely with the tortious "actual intent to cause injury."** *See Gardner v. Rogers*, 224 Ga. App. 165, 169(4), 480 S.E.2d 217 (1996). **On the other hand, if Appellees shot Gaddis in self-defense, then they had no actual tortious intent to harm him**, but acted only with the justifiable intent which occurs in every case of self-defense, which is to use such force as is reasonably believed to be **necessary** to prevent death or great bodily injury to themselves or the commission of a forcible felony. OCGA §§16-3-21(a), 51-11-1.

271 Ga. at 33, 518 S.E.2d at 125 (emphasis added). In essence, the Eleventh Circuit has added an extraneous gloss to the Georgia standard that essentially requires proof of criminal culpability to impose civil liability.

While subjective bad faith is generally required to establish "actual intent to injure," such intent can be inferred in Georgia if someone is shot "intentionally and without justification." *Id.* Stated differently, where a trained police officer who knows the rules on use of deadly force – and who makes a deliberate decision to use deadly force with full knowledge of those rules – it can be inferred by a jury under Georgia law that the officer acted with malice. While a jury may not find that there was malice, the court cannot decide as a matter of law that there was no malice. Because there

is a jury question under Georgia law as to whether Officer Hart acted in self-defense or "acted intentionally and without justification," he is not entitled to official immunity as a matter of law, and the court below erred by granting summary judgment on the state law claim rather than dismissing without prejudice in deference to the Georgia courts.

If the Court is loath to delve into the vagaries of Georgia law, that is all the more reason for the courts below to have declined supplemental jurisdiction. Arcane issues of Georgia law are best decided by state courts which deal with them daily.

CONCLUSION

Certiorari should be granted for the following reasons:

- There is a need for clarification of the balance between the Second and Fourth Amendments when it comes to the right of citizens to bear arms within the privacy of their homes, however unconventional or eccentric the manner in which that right is exercised, without being subject to unreasonable seizures (including deadly force) by the government. Given the recent rise of state "open carry" laws and the increasingly visible presence of firearms at political rallies and public demonstrations, the law enforcement

community needs constitutional guidance on the proper response to the mere sight of a firearm in either a public or private setting.

- There is a need to clarify the law on whether mere possession of a deadly weapon justifies an immediate escalation to the use of deadly force when other options are available, which has led to inconsistent rulings both between and within the circuits causing confusion among law enforcement officers as to the point at which a potential lethal threat becomes an imminent one.

- There is a need for consistency in the exercise of supplemental jurisdiction under 28 U.S.C. §1367 by requiring courts to actually weigh the factors of comity, convenience, fairness, and judicial economy in deciding whether to retain jurisdiction to decide state law claims when there is no longer any independent basis for federal jurisdiction, there are substantive differences between federal and state law, and state courts are better suited to decide questions of state law.

- There is a strong need for the Court to reiterate its admonition in *Tolan v. Cotton* that all reasonable inferences be construed in favor of the nonmoving party when deciding legal questions such as qualified immunity based on assumptions of fact that are legitimately

> disputed. Given the increased public awareness of police shootings and law enforcement practices in general, it is important from the standpoint of maintaining trust in the judiciary that courts not rely uncritically upon self-serving accounts of officers when the only witnesses who could directly rebut those accounts did not survive the encounter. Rule 56 requires that such self-serving testimony be subject to a credibility determination by jurors in the context of other relevant factors such as physical evidence and expert testimony.

Accordingly, the Court should grant the writ and reverse the judgment below.

Respectfully submitted,

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