No. 21-423

In the
Supreme Court of the United States

JASON CUNNINGHAM, Individually and as Administrator ad Litem and Personal Representative of the Estate of Nancy Jane Lewellyn, Deceased,
Petitioner,

v.

ROBERT PASCHAL, Individually and in his Official Capacity as a Shelby County Sheriff's Deputy and MARVIN WIGGINS, Individually and in his Official Capacity as a Shelby County Sheriff's Deputy,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Police officers may use deadly force when, in the face of rapidly evolving circumstances, they have probable cause to believe the suspect poses a serious physical threat to either the officers or members of the public. Nancy Lewellyn called 911 and told dispatch she was going to shoot herself or the next person she saw (including any police that came to stop her) with a .45 caliber handgun and then, less than a minute after deputies arrived on the scene, she emerged from her house with a silver pistol in her hand that she raised multiple times both before and while being shot. Did the Sixth Circuit correctly rule that the deputies did not violate clearly established law in shooting Ms. Lewellyn?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 DISCLOSURE STATEMENT

The Respondents are Marvin Wiggins and Robert Paschal, both Shelby County, Tennessee Sheriff's Deputies, and Defendants below. The Petitioner is Jason Cunningham, adult son, administrator *ad litem*, and personal representative of Nancy Lewellyn (deceased), and Plaintiff below, who filed the underlying action under 42 U.S.C. § 1983.

No corporations are involved in this proceeding.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF THE CASE

Deputy Robert Paschal had four seconds from the moment Nancy Lewellyn first walked out her door and the moment he saw her begin to raise her silver pistol—what she said was "a .45" with which she intended to shoot the deputies, herself, or anyone else she saw. Paschal opened fire as he saw her gun come up. Deputy Marvin Wiggins pulled up as this was happening, also saw Lewellyn raise the gun, and began firing after taking cover and hearing shots. Once they began firing, the deputies fired ten shots in a single volley inside of eight seconds. The entire event—from the moment Lewellyn opened her door to the deputies' final shot—occurred in eleven seconds. The event was captured via dashcam footage.

The District Court ruled that Wiggins and Paschal were not entitled to qualified immunity. In doing so, the Court relied on paused video freeze-frames of the eleven-second encounter to analyze fraction-of-a-second changes in Lewellyn's movements and to speculate on possible non-violent subjective motivations she might have had for those movements. The Sixth Circuit reversed, ruling that this freeze-frame analysis amounted to the kind of 20/20 hindsight review of use-of-force prohibited by *Graham v. Connor*, 490 U.S. 386 (1989). More fundamentally, the Sixth Circuit ruled that no case law from either this Court or the Sixth Circuit squarely proscribed Wiggins and Paschal's conduct in the circumstances they faced, and that they therefore did not violate clearly established law. Wiggins and Paschal respectfully submit that both of

these findings were correct and that there is no need to grant this Petition.

1. The 911 call

Nancy Lewellyn called 911 in Shelby County, Tennessee on March 17, 2017. She told the dispatcher she was suicidal, had a gun, and would shoot anyone who came to her residence to try and stop her. (Paschal Dep., RE 83-7, PageID 373-74 ("Dispatch put out a mental violent call . . . that she was basically going to shoot herself or the first person she saw."); *accord* Wiggins Dep., RE 83-6, PageID 354 ("[W]e received a call of a female white stating that she was armed with a handgun, a silver pistol, and that she didn't want to do this anymore, and if anybody came to the house, she would shoot them as well.")). Lewellyn said she believed the handgun was a .45 caliber pistol. (SUV 1, 2 Dashcam, 12:11:51).[1]

Sheriff's Deputies Wiggins, Paschal, and Justin Jayroe responded to the call. (SUV 1, 2, 3 Dashcam; Paschal Declaration, RE 83-4; Wiggins Declaration, RE 83-5). Each deputy drove in a separate, marked Sheriff's Office SUV, equipped with front and rear video/audio cameras.

Paschal and Jayroe arrived at the front of Lewellyn's house in their SUVs within seconds of each

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[1] Wiggins and Paschal filed with the District Court the dashcam footage on three (3) CDs—one from each of the three deputies' vehicles. (RE No. 61-3). The SUVs will be referred to as "SUV 1," "SUV 2," and "SUV 3" based on the order in which they arrived on the scene.

other. (SUV 1, 2 Dashcam, 12:13:23-24). Jayroe parked SUV 1 so that the front dashboard camera faced Lewellyn's front door and driveway. (SUV 1 Dashcam). Paschal lined SUV 2 up roughly right behind SUV 1. (SUV 2 Dashcam). SUV 2's blue flashing lights were on. (SUV 3 Dashcam). Before Wiggins arrived, Paschal and Jayroe exited their vehicles and positioned themselves on either side of Jayroe's SUV—SUV 1. (SUV 2, 3 Dashcam). Wiggins pulled up in SUV 3 (also with blue lights flashing)[2] behind Paschal's vehicle. Wiggins' dashcam shows multiple civilian vehicles parked at neighboring houses and at least one civilian walking or standing outside a few houses down. (SUV 3 Dashcam, 12:14:08). Wiggins pulled up at roughly the same moment Lewellyn emerged from her house. (SUV 3 Dashcam, SUV 2 Rear Dashcam).

2. The eleven-second event

Forty-four seconds after SUVs 1 and 2 arrived, Lewellyn opened her front door and walked out of the house at 12:14:07. (SUV 1 Dashcam). At that moment, she had a silver handgun in her right hand and had it raised at roughly chest or eye level. (SUV 1 Dashcam).

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[2] The clocks on the videos from SUVs 1 and 2 sync up. However, the clock on SUV 3 is two or three seconds behind the others. For purposes of this appeal, the times are cited as SUVs 1 and 2 reflect them, unless otherwise specified.

(RE 83-8, PageID 391). This is a photograph of the gun she held.[3]

As the District Court described it, at that moment she appeared to "raise[ ] the gun in the SUV's general direction." (District Court Order, RE 112, PageID 714) (citing SUV 1 Dashcam, 12:14:08). Wiggins pulled up as Lewellyn was walking through her front door and testified that he saw her raising the gun. (Wiggins Dep., RE 83-6, PageID 355) ("As soon as I put my car in park . . . I went and took cover behind my truck

[3] The parties now know it was, in fact, a bb gun. However, no evidence in the record suggests the deputies knew or could have known it was not a real .45 caliber pistol. (Wiggins Dep., RE 83-6, PageID 368; Paschal Dep., RE 83-7, PageID 378). Petitioner claims Wiggins "states in his deposition that the bb gun held by Nancy Lewellyn was not a real gun." (Pet'r's Br. 9) (bold omitted) (citing RE 100, PageID 586). Wiggins actually testified that he only ***later*** learned it was not real. (RE 100, PageID 586). And Petitioner stipulated in a prior hearing before the District Court to the fact that the bb gun looked authentic. (RE 67, PageID 275). *See Savage v. City of Memphis*, 620 F. App'x 425, 428 (6th Cir. 2015).

because I saw her raising the weapon up."). Nonetheless, the deputies did not fire.

Lewellyn then lowered the gun as she continued to walk out of the house, stepping around a tree that sat between her and the deputies. (SUV 1 Dashcam). Once she cleared the tree, a deputy yelled what sounds like "Hey, Ma'am!" (SUV 1, 2 Dashcam, 12:14:11-12). As he yelled this, Lewellyn began to raise the gun again. (SUV 1 Dashcam, 12:14:12). The District Court's video freeze-frame Figures 1, 2, and 4 most clearly depict this sequence.

(District Court Order, RE 112, PageID 717, Figure 1).

(District Court Order, RE 112, PageID 718, Figure 2).

(District Court Order, RE 112, PageID 721, Figure 4).

This time Paschal (standing to the right of the SUV in this image) saw Lewellyn raising the gun, roughly four seconds after first seeing her walk out her front door. (Paschal Dep., RE 92-1, PageID 462-63; RE 83-7, PageID 376). Only when the gun was coming up for the second time did Paschal fire, striking Lewellyn in the side or back. (SUV 1 Dashcam, 12:14:12; Paschal Dep., RE 92-1, PageID 462-63). "I remember her turning, lifting the gun. And then I started firing." (Paschal Dep., RE 83-7, PageID 376). Petitioner claims that Lewellyn did not raise the gun until after the first shot. (Pet'r's Br. 12). This is not true, and is blatantly contradicted by the video evidence. The video plainly shows her raising the gun as seen in the image above

before Paschal fires his first shot. Both Courts below agreed on this point. (District Court Order, RE 112, PageID 717; Sixth Circuit Order, RE 117, PageID 767). Paschal testified that he did not give a warning because of how quickly Lewellyn raised her gun. (RE 92-2, PageID 476).

After Paschal's first shot, Lewellyn began panning the gun to her left (toward SUV 1), with her left hand coming up to support her gun hand. The District Court's freeze-frame below of the video "Figure 5" most clearly depicts this. (District Court Order, RE 112, PageID 722). Paschal saw this as well. (RE 92-1, PageID 463-64).

(District Court Order, RE 112, PageID 722, Figure 5). As the District Court described it, Figures 4 and 5 show

that after the first shot "Lewellyn rotated her body from her driveway ***toward Paschal*** . . . ." (District Court Order, RE 112, PageID 723) (internal citations omitted, emphasis added). "She pointed the gun in the direction of all of us." (Paschal Dep., RE 92-1, PageID 464). A fraction of a second later she again lowered the gun. However, she did not drop the gun, and instead continued moving swiftly toward her car. (SUV 1 Dashcam).

Paschal continued shooting in a volley. By this time, Wiggins had gotten out of his SUV, run for cover, and heard shots. (*See* SUV 2, 3 Dashcam; Wiggins Dep., RE 83-6, PageID 356-57) ("The last thing I saw before the shooting took place was Ms. Lewellyn coming out of her home, walking straight, raised the gun. I went and took cover and came back out."). Wiggins then began firing as Lewellyn moved towards her car and pushed herself up off its front hood. (SUV 1 Dashcam). Although the deputies continued to fire as she fell to the ground, Lewellyn continued to shift her position on the ground even after the last shot was fired. (SUV 1 Dashcam, 12:14:18-19). The deputies fired a total of ten shots in a volley of quick succession, all in less than eight seconds. (SUV 1, 2, 3 Dashcam). From the moment Lewellyn opened the door with her gun raised to the moment the last shot was fired, eleven seconds elapsed. (SUV 1 Dashcam). Although Deputy Jayroe did not fire, he did not realize that fact until later. (RE 90, PageID 412-13) ("At the time I was unaware if I [discharged my weapon] or not.").

At the moment Lewellyn fell to the ground, Wiggins and Paschal did not perceive that she ever lost control

of her gun. (Wiggins Dep., RE 83-6, PageID 362, 386; Paschal Dep., RE 83-7, PageID 360, 362, 367-69, 378). Neither did Jayroe. (RE 90, PageID 413). The parties ***now*** know that, when she leaned onto the car, Lewellyn deposited the gun on the car's hood. But it is undisputed that none of the three deputies on the scene saw her do this, as the car was facing away from them and the hood sloped downward and away from them. (SUV 1 Dashcam). The District Court agreed that the deputies did not "perceive[ ] Lewellyn put the gun on the car's hood." (District Court Order, RE 112, PageID 736).

In the same vein, Petitioner correctly points out that the video does not show Wiggins and Paschal's "sight line" from their perspective. (Pet'r's Br. 3). Thus, although a close inspection of the video includes a moment in which both Lewellyn's hands are empty as she falls, the video does not show whether the deputies could see the same thing through their own muzzle flashes or against the backdrop of her dark shirt from their respective angles. However, both deputies testified, unequivocally, that they did ***not*** realize she had ever lost control of the gun until they approached her after the last shot. (Wiggins Dep., RE 83-6, PageID 362; Wiggins Declaration, RE 83-5, PageID 350; Paschal Dep., RE 83-7, PageID 378; Paschal Declaration, RE 83-4, PageID 347). In fact, one of the deputies yelled "Put the gun down!" immediately after the last shot was fired. (SUV 1 Dashcam). The other two deputies similarly yelled for Lewellyn to show them her hands as they approached her after the shots. (SUV 1 Dashcam).

The deputies also testified to the difficulty in processing what they were seeing as fast as it was happening. As Wiggins described it, "tunnel vision kicked in . . . ." (Wiggins Dep., RE 83-6, PageID 364). As Paschal stated, "I don't even remember hearing my shots that well . . . I guess due to the adrenalin." (Paschal Dep., RE 92-1, PageID 463). "I just remember the weapon being raised up and just how quick it happened." (RE 92-2, PageID 476).

Immediately after the deputies secured her gun, they began trying to save Lewellyn's life. One deputy told another to go get some gauze and a "med kit." (SUV 1 Dashcam). The deputies attempted to stop the bleeding until the paramedics arrived. Despite their efforts to save her, Lewellyn died at the hospital.

3. Procedural history

Petitioner Jason Cunningham brought suit under § 1983 against Shelby County, Marvin Wiggins, and Robert Paschal, alleging violations of Lewellyn's Fourth Amendment rights. (*See* RE 1). Defendants filed an Answer, in which Wiggins and Paschal asserted qualified immunity. (RE 29). Wiggins and Paschal then filed a Motion for Summary Judgment based on the video evidence. (RE 61). The Petitioner moved to take limited discovery on the qualified immunity issue before responding to the summary judgment motion, (RE 66), which the District Court allowed, (Scheduling Order, RE 68, PageID 287 n.1) ("[T]here is a video of the shooting. And Wiggins's and Paschal's depositions will show what they perceived as happening and what they knew beforehand."). At the conclusion of the limited discovery period, Wiggins and Paschal filed

their Amended Summary Judgment motion. (RE 83). The District Court on April 1, 2020 entered an order denying their Motion. (RE 112). They timely appealed to the Sixth Circuit, which reversed the District Court on April 19, 2021. (RE 117).

REASONS FOR DENYING THE PETITION

Petitioner does not provide any reason why this case is appropriate for certiorari. He complains only of errors the Sixth Circuit allegedly committed. None of these issues gives rise to Supreme Court review under Supreme Court Rule 10.

In any event, Petitioner's arguments are without merit. The Sixth Circuit correctly ruled that Wiggins and Paschal did not act objectively unreasonably. And even if they did, the Court also correctly ruled that their conduct was not clearly proscribed by on-point decisions from either this Court or the Sixth Circuit. Quite to the contrary, they faced more dangerous circumstances than officers in other Sixth Circuit cases who have also received qualified immunity.

I. THE SIXTH CIRCUIT CORRECTLY RULED THAT WIGGINS AND PASCHAL ARE ENTITLED TO QUALIFIED IMMUNITY.

Qualified immunity shields government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). This immunity "gives government officials breathing room to make reasonable but mistaken

judgments" and protects "all but the plainly incompetent or those who knowingly violate the law." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)); *Saucier v. Katz,* 533 U.S. 194, 206 (2001) ("Qualified immunity operates . . . to protect officers from the sometimes 'hazy border between excessive and acceptable force.'").

Courts analyze excessive force claims under an objective reasonableness standard. *Graham v. Connor*, 490 U.S. 386, 397 (1989). As the *Graham* Court explained, 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." *Id.* at 396. Law enforcement officers face "tense, uncertain, and rapidly evolving" situations that require "split-second judgments." *Id.* at 397. In analyzing an officer's use of force, courts therefore "must be careful not to substitute our personal notions of proper police procedure for the instantaneous decision of the officer at the scene." *Mullins v. Cyranek*, 805 F.3d 760, 766 (6th Cir. 2015) (citation, internal quotation marks omitted). Instead, courts adopt a "built-in measure of deference to the officer's on-the-spot judgment about the level of force necessary in light of the circumstances of the particular case." *Burchett v. Kiefer*, 310 F.3d 937, 944 (6th Cir. 2002).

A. The law did not clearly establish the rules Petitioner suggests.

There is no case from either this Court or the Sixth Circuit clearly establishing the rules Petitioner implies are applicable. Specifically, it is not clearly established

in the Sixth Circuit that officers must wait for the suspect to aim right at them before firing, or that they must give a warning and await the suspect's response when the suspect is in the middle of raising a gun, especially when that suspect has stated she intends to shoot officers and others. To the contrary, the Sixth Circuit has ruled that officers are entitled to qualified immunity for fast-paced volleys of fire against armed suspects, even when those suspects drop their guns, turn their backs, or fall to the ground mid-volley. Even if this Court overrules any of those findings, Wiggins and Paschal are still entitled to qualified immunity because the rules Petitioner attempts to impose on them are not and were not clearly established at the time of their actions.

1. The deputies did not have to wait for Lewellyn to aim her gun directly at them.

Petitioner devotes great attention to the fact that Lewellyn was not constantly aiming the sights of her handgun directly at the officers. But clearly established law in the Sixth Circuit did not require them to wait for such an event to fire in self-defense. *Thomas v. City of Columbus, Ohio*, 854 F.3d 361, 365 (6th Cir. 2017) (officer who encountered and fatally shot an individual running out of a house with a firearm in hand was "entitled to immunity regardless of whether Destin raised the gun."). And unlike this case, the suspect in *Thomas* had not stated that he intended to shoot any officers who arrived on the scene. *See id.* at 365-66; *Thornton v. City of Columbus*, 727 F. App'x 829, 838 (6th Cir. 2018) ("The Officers also did not have to wait

for Thornton to raise his weapon before employing deadly force."); *Leong v. City of Detroit*, 151 F. Supp. 2d 858, 865-66 (E.D. Mich. 2001) ("Plainly, an armed and gun-wielding suspect can turn and train his weapon on an officer or bystander in an instant, with disastrous consequences."); *see generally Jordan v. Howard*, 987 F.3d 537 (6th Cir. 2021) (officers received qualified immunity after firing ten shots at suspect, despite one officer testifying he did not know whether suspect ever pointed his gun at officers and despite fact that suspect may have dropped gun mid-volley); *Livermore ex rel Rohm v. Lubelan*, 476 F.3d 397, 405 (6th Cir. 2007); *Boyd v. Baeppler*, 215 F.3d 594, 599-600 (6th Cir. 2000) ("Whether [the suspect] actually fired the weapon is wholly immaterial here. The issue is whether or not he ***threatened*** to do so.") (emphasis added). Officers may shoot in self-defense to prevent the suspect from aiming the weapon directly at them; they do not have to wait for the suspect to aim and hope they are not shot first.

Petitioner argues along the same lines that Lewellyn was too far away, but there is no clearly established law establishing a minimum safe distance when suspects are armed with firearms. And this Court's ruling in *White v. Pauly*, 137 S. Ct. 548 (2017) cuts against Petitioner's argument. The *White* Court found that the officer was entitled to qualified immunity for shooting a suspect from 50 feet away while the officer had cover behind a rock wall. *Id.* at 550; *see also Reich v. City of Elizabethtown, Kentucky,* 945 F.3d 968, 981 (6th Cir. 2019) ("Shooting [the knife-wielding suspect] from a distance of twenty-five to

thirty-six feet would not have violated any clearly established right.").

Both deputies saw Lewellyn raising her gun at least once. (Wiggins Dep., RE 83-6, PageID 355-57; Paschal Dep., RE 92-1, PageID 462-63, 468). Although she was pointing the gun outward, rather than directly at the deputies, all she had to do was pan her wrist a few inches and the gun would be trained on them—a gun she said was a .45 with which she would shoot anyone she saw. And in fact, such a panning motion was exactly what Lewellyn did immediately after the first shot—panning her wrist toward SUV 1. (District Court Order, RE 112, PageID 722, Figure 5). No clearly established law gave either deputy notice that using deadly force in this situation was objectively unreasonable.

2. Paschal was not required to give a warning in these circumstances.

Petitioner suggests that, in the four-and-a-half seconds between Paschal's first realizing Lewellyn was exiting the house and when he saw her begin to raise her gun, he should have given her a warning and waited longer to see what she did. But no clearly established law provides that he was required to do this in these circumstances. When the "hesitation involved in giving a warning could readily cause such a warning to be [the officer's] last," then a warning is not feasible. *McLenagan v. Karnes*, 27 F.3d 1002, 1007 (4th Cir. 1994); *see Powell v. Mayhew*, 165 F.3d 32, at *3 (7th Cir. 1998) (table opinion) ("Mayhew had only seconds to react. Had he not shot at Powell, he would have put his own life at risk, something the Fourth

Amendment does not require of officers. Under the circumstances, a warning was not feasible . . . ."); *accord Liggins v. Cohen*, 971 F.3d 798, 801 (8th Cir. 2020). Petitioner can point to no controlling case clearly establishing that a warning is feasible when the suspect is moving and raising a gun up that she has stated she will use to shoot the first person she sees. Paschal did not believe he had time to give a warning. This belief was not wholly unreasonable or clearly established as unconstitutional.

3. Clearly established law does not fault officers for failing to perceive immediately or accurately that a suspect has discarded her weapon.

Qualified immunity applies not just to an officer's mistake as to what the law requires, but to mistakes of fact as well, giving officers "ample room for mistaken judgments . . . ." *Malley v. Briggs*, 475 U.S. 335, 343 (1986). This is true whether the mistake is a mistake "of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (citation omitted). Put another way, the Fourth Amendment "does not require [officers] to perceive a situation accurately." *Thomas v. City of Columbus, Ohio*, 854 F.3d 361, 365 (6th Cir. 2017).

In shooting cases, officers do not lose qualified immunity or act unreasonably in failing to instantaneously and accurately perceive that a suspect has discarded her gun. Instead, "***[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." *Untalan v. City of Lorain,* 430 F.3d 312, 315-16 (6th Cir. 2005) (emphasis added).

The Sixth Circuit's opinion in *Mullins v. Cyranek*, 805 F.3d 760 (6th Cir. 2015) speaks directly to this issue. The officer in *Mullins* engaged in a physical altercation with the suspect during a stop and the suspect pulled out a handgun. *Id.* at 763-64. During the scuffle, the suspect threw his gun ten to fifteen feet away from both him and the officer. However, the officer did not perceive this immediately and, within the following five seconds, shot the suspect twice. *Id.* at 764. The Sixth Circuit held that the officer acted reasonably because he did not have enough time between the suspect drawing the gun and discarding it to reassess the situation and perceive or process that the suspect was no longer armed:

> The fact that Mullins was actually unarmed when he was shot is irrelevant to the reasonableness inquiry in this case. Rather, what matters is the reasonableness of the officer['s] belief. Because only a few seconds passed between when Mullins brandished his firearm and when Cyranek shot Mullins, a reasonable officer in the same situation could have fired with the belief that Mullins still had the gun in his hand.

Id. at 767-68 (internal citations, quotation marks, and ellipsis omitted); *accord Nelson v. City of Battle Creek, Michigan*, 802 F. App'x. 983 (6th Cir. 2020) (officer who ordered suspect to show hands and then fired as suspect was throwing bb gun away from him entitled to

qualified immunity); *Est. of Valverde by & through Padilla v. Dodge*, 967 F.3d 1049, 1063 (10th Cir. 2020) (collecting cases where officers acted reasonably in continuing to fire despite hindsight realization that suspect lost control of gun).[4]

In *Mullins*, the video footage showed that as many as ***five*** seconds elapsed between the moment the suspect threw his firearm away and when the defendant officer ceased fire. *Mullins*, 805 F.3d at 764. The officer nonetheless received qualified immunity. *See id.* Here, a maximum of ***four*** seconds elapsed between Lewellyn letting go of her gun, (SUV 1 Dashcam, 12:14:15), and the last shot being fired, (SUV 1 Dashcam, at 12:14:18). Under *Mullins*, that Wiggins and Paschal continued firing for three to four seconds after Lewellyn discarded her gun on the hood of the car (which the District Court ruled the deputies could not have seen) was not objectively unreasonable. At the very least, their conduct was not clearly established beyond debate as unconstitutional in light of *Mullins*. The Sixth Circuit did not err in reversing the District Court here.

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[4] Some of the cases discussed herein were issued after the events of this case. Wiggins and Paschal recognize that cases decided after-the-fact cannot ***deprive*** an officer of qualified immunity because "an official could not reasonably be expected to anticipate subsequent legal developments . . . ." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). But that door does not swing both ways. Subsequent opinions ***can*** show that the law was ***not*** clearly established at the time of the events at issue. *See Wilson v. Layne*, 526 U.S. 603, 618 (1999); *Swanson v. Town of Mountain View, Colo.*, 577 F.3d 1196, 1200 (10th Cir. 2009).

4. Officers are not liable for firing a volley of shots that continues even after the suspect falls to the ground.

Petitioner focuses on the fact that the deputies continued to fire as Lewellyn continued to move and fall to the ground, but this was not in violation of clearly established law. Firing a volley of shots during and after a suspect falls to the ground does not render an officer's use of force unreasonable. The Sixth Circuit reaffirmed this point in a case with facts almost identical to this case in *Williams v. City of Chattanooga, Tennessee*, 772 F. App'x 277 (6th Cir. 2019). Officers in *Williams* responded to a home with a report of a mental health issue after the suspect—Javario Eagle—called 911 and made "several bizarre statements" to the dispatcher, such as "I'm fixing to stop all of this s---, y'all know that right?" *Id.* at 278. Once officers arrived on the scene, Mr. Eagle pulled out a handgun and, after coming in and out of his apartment several times, charged out with the handgun and a sword toward an officer. *Id.* The officers fired two shots at Eagle, causing him to drop both weapons and fall on the ground. *Id.* at 279. As one officer then moved toward Eagle, "Eagle shifted his position, rolling onto his stomach with both arms outstretched in front of him on the ground. Eagle's head was tilted forward and looking up. At this point, [five officers] fired their weapons." *Id.* Eight bullets struck Eagle, who later died as a result. *Id.*

The *Williams* Court found that the officers were entitled to qualified immunity. *Id.* at 278. The plaintiffs argued that the second volley, fired while Eagle was

unarmed and lying on the ground, was not reasonable. But the Sixth Circuit disagreed:

> [T]he circumstances show all defendant-Officers acted reasonably when firing the second volley . . . After the first volley, Eagle continued to shift his position on the ground and Officers did not know where Eagle's pistol was at the time he stretched his arms out. The Officers had probable cause to shoot Eagle, even those arriving later in time, because they could have reasonably believed that Eagle was reaching for his gun as he was moving on the ground, consistent with his prior sprint toward Churchwell. Accordingly, the Officers' decisions to fire a second volley were not objectively unreasonable.

Id. at 281 (original internal brackets, quotation marks, and citations omitted); *accord Stevens-Rucker v. City of Columbus, Ohio*, 739 F. App'x 834 (6th Cir. 2018) (officer entitled to qualified immunity for continuing to shoot knife-wielding suspect at ten or fifteen feet as suspect fell to ground because "a single shooting consisting of four shots fired within a second of one another . . . was not enough time for [officer] to stop and reassess the threat level between the shots."); *see also City & County of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1771 (2015) ("There is a dispute regarding whether Sheehan was on the ground for the last shot. This dispute is not material: Even if Sheehan was on the ground, she was certainly not subdued.") (citation and internal quotation marks omitted); *Gaddis ex rel. Gaddis v. Redford Twp.*, 364 F.3d 763,

777 (6th Cir. 2004) ("[Plaintiff] finally suggests that even if his actions justified a lethal response, the officers crossed the constitutional line by firing sixteen shots at him. We disagree. While the two officers fired a total of sixteen shots at him, it was a single volley."); *see, e.g.*, *Salaam v. Wolfe*, 806 F. App'x 90, 94 (3d Cir. 2020); *Jean-Baptiste v. Gutierrez*, 627 F.3d 816, 821-22 (11th Cir. 2010).

Petitioner's argument ignores the reality recognized in the cited cases that reaction time is not instantaneous, and that in such a fast-paced, adrenaline-fueled scenario deputies are not always able to stop and reassess the situation in fractions of seconds after perceiving a threat to their lives.

5. Officers are not liable even if some of their shots strike a suspect in the back during a fast-paced volley of fire.

A use of deadly force is not unreasonable simply because a suspect is struck in the back or side. *Thornton v. City of Columbus*, 727 F. App'x 829 (6th Cir. 2018); *accord Gaddis*, 364 F.3d at 777. As with a suspect's discarding of a weapon discussed above, an officer may fail to perceive instantaneously that a suspect is turning a few seconds after a volley of shots has begun. Such a failure in perception during a split-second altercation does not amount to a constitutional violation. Based on the principles established in *Mullins* and *Thomas* discussed above, the deputies' failure to perceive which direction Lewellyn's body was facing every instant does not equate to an objectively unreasonable act, especially since she could have again

panned the gun back toward the SUVs and fatally shot any one of the deputies.

6. Petitioner's cited cases do not support reversal of the Sixth Circuit.

The cases Petitioner relies on do not establish the rules he suggests. First, Petitioner relies on a series of cases which involved suspects armed with knives, or who were not armed at all. *See Burgess v. Fischer*, 735 F.3d 462 (6th Cir. 2013); *McCaig v. Raber*, 515 F. App'x 551 (6th Cir. 2013); *Floyd v. City of Detroit*, 518 F.3d 398 (6th Cir. 2008); *Bouggess v. Mattingly*, 482 F.3d 886 (6th Cir. 2007); *Ciminillo v. Streicher*, 434 F.3d 461 (6th Cir. 2006); *Sova v. City of Mt. Pleasant*, 142 F.3d 898 (6th Cir. 1998); *Russo v. City of Cincinnati*, 953 F.2d 1036 (6th Cir. 1992). At a minimum, the suspects in those cases were not armed with guns; thus, those cases do not clearly establish Wiggins and Paschal's conduct as unconstitutional. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) ("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.") (citations, internal quotation marks omitted).

Petitioner also relies on Sixth Circuit cases where, at the very least, the suspects were armed with guns. However, none of those cases is so on-point as to squarely govern the facts at issue here (or to nullify the effect of the rulings in *Williams*, *Thomas*, *Mullins*, *Thornton*, and *Nelson*). *See Margeson v. White Cty., Tenn.*, 579 F. App'x 466 (6th Cir. 2014) (court found that initial shooting of suspect inside his home was

reasonable, but that shooting him as many as 43 times in separate volleys presented a jury question)[5]; *King v. Taylor*, 694 F.3d 650, 654, 662-63 (6th Cir. 2012) (jury question where officer shot suspect in his house through a window while suspect was "lying on his couch, not making any threatening gestures towards the officers.")[6]; *Bletz v. Gribble*, 641 F.3d 743 (6th Cir. 2011) (jury question where suspect was complying with officer's command to lower gun when shot and officers had no reason to believe suspect would behave violently before they arrived); *Dickerson v. McClellan*, 101 F.3d 1151, 1163 (6th Cir. 1996) (under plaintiff's version of events, suspect "had simply walked slowly to the front door, with his hands at his side, and [ ] he was shot while still inside his house before he opened his door."); *Brandenburg v. Cureton*, 882 F.2d 211 (6th Cir. 1989) (jury question where police shot property-owner while serving a peace warrant on rural 30-acre property with no mention of other houses or people nearby or in potential danger, and where officers were not responding to a call suggesting suspect intended to shoot anyone he saw)[7]; *see also Craighead v. Lee*, 399

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[5] The *Williams* case, which is much more factually analogous to the case at bar than *Margeson*, went to great lengths to explain how *Margeson* was distinguishable. *See Williams*, 772 F. App'x at 281.

[6] *See Tucker v. Marquette Cty., Michigan*, No. 20-1878, 2021 WL 2828027, at *4 (6th Cir. July 7, 2021) (explaining *King*).

[7] The *Brandenburg* ruling hinged primarily on the fact that there was a jury question as to whether the suspect was pointing his weapon at the officer when shot. Whatever principle *Brandenburg* may have established when issued in 1989 has, at the very least, been muddied by subsequent Sixth Circuit cases finding that

F.3d 954 (8th Cir. 2005) (police officer encountered an assault victim struggling with a perpetrator over a gun and fired a shotgun blast that killed the innocent victim). None of these cases dealt with someone moving quickly out of their house into a populated cul-de-sac and pointing a gun out toward houses and later panning the gun back toward the officers after the shooting began. The Sixth Circuit's rulings in *Thomas*, *Williams*, *Mullins*, *Nelson*, and *Thornton* provide much closer sets of facts to this case, and in each of those cases the officers received qualified immunity. At the very least, these two sets of cases show that the rule Petitioner seeks to impose was not so clearly established that every reasonable official would have recognized their conduct as unreasonable.

Lastly, Petitioner cites briefly to dicta from this Court's opinion in *Plumhoff v. Rickard*, 572 U.S. 765 (2014), but *Plumhoff* is more favorable to Wiggins and Paschal. The *Plumhoff* Court found those officers entitled to qualified immunity for firing fifteen shots over ten seconds. *Id.* at 777. Petitioner cites to dicta from *Plumhoff* where the Court mentioned that it "would be a different case" if the officers had initiated a second round of shots after the suspect had been "clearly incapacitated." *Id.* This does not deprive Wiggins and Paschal of qualified immunity. First, there was only one volley here—ten shots fired in less than eight seconds. Once Lewellyn was clearly incapacitated, the deputies ceased fire. Second,

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officers do not have to wait for the suspect to point the gun at them. *See, e.g.*, *Thomas v. City of Columbus, Ohio*, 854 F.3d 361 (6th Cir. 2017).

Plumhoff's dicta about a case involving a suspect fleeing in a vehicle did not clearly establish Wiggins and Paschal's conduct as unconstitutional. *See Morrow v. Meachum*, 917 F.3d 870, 875 (5th Cir. 2019) (collecting cases showing that "clearly established law comes from holdings, not dicta."). Wiggins and Paschal did not violate clearly established law.

B. In light of this case law, Wiggins and Paschal did not violate clearly established law.

Taken in the light depicted in the video, Wiggins and Paschal's actions were not objectively unreasonable during the eleven-second scenario they faced. Before Lewellyn exited the house, the deputies had been told that she was in possession of a .45 caliber handgun, and that she said she would shoot anyone who came to the scene. Only as she was raising the gun for the second time, and after Wiggins and Paschal had each seen her raise it, did Paschal fire.

After the first shot, Lewellyn did not drop the gun, nor did she stop moving. Whether she meant to take cover behind the car or had some other purpose was unknown to the deputies. She was still armed, and in response to the first shot she began to pan the gun back around to the SUV where Paschal was standing. Thus, Paschal kept firing shots in quick succession, perceiving that the threat was not over. Wiggins fired based on what he had seen when he pulled up, and based on the shots he heard from behind cover. All ten shots were fired in under eight seconds. Even after Lewellyn fell, the deputies did not know where her gun was and she continued to shift her position on the

ground. If she had still been armed (as they thought she was), a shot fired from the ground would have been just as deadly to them as one fired from a standing position.

Like in *Williams*, after dropping the gun Lewellyn continued to move and, like in *Williams, Mullins*, and *Nelson*, the deputies did not know she no longer had the gun or have time to process that fact before it was all over. It was not unconstitutional for them to fail to perceive a fraction-of-a-second change in circumstances accurately—mid-volley—or to reassess instantaneously the situation between each shot against a perceived deadly threat.

1. Deputy Jayroe not firing is not material.

Petitioner attempts to make issue of the fact that Deputy Jayroe did not fire, (Pet'r's Br. 4), but that fact is not material. Deadly force is not unreasonable simply because officers were present who did not fire. *See Savage v. City of Memphis, Tennessee*, No. 2:13-CV-2614-SHL-CGC, 2014 WL 11515753, at *6 (W.D. Tenn. Nov. 13, 2014) ("While the other officers on the scene did not shoot their weapons, there is nothing in the record to suggest that Officer Archie's contention that he perceived the threat of serious harm was erroneous."), *aff'd* 620 F. App'x 425 (6th Cir. 2015). The question is whether "***every*** reasonable official" would have considered the conduct unreasonable. *D.C. v. Wesby*, 138 S. Ct. 577 (2018) (emphasis added).

Moreover, Petitioner has produced no evidence to suggest Jayroe's reason for not shooting, or suggesting

that Jayroe even deliberately chose not to shoot.[8] Wiggins and Paschal remain entitled to qualified immunity.

2. Petitioner asks the Court to conduct a 20/20 hindsight analysis.

Petitioner essentially asks the Court to review this case with 20/20 hindsight. He argues that, after discarding her gun on the hood of the car, Lewellyn "stretches out both arms and it is obvious and ***you*** can plainly see that both of her hands are open and empty . . . ." (Pet'r's Br. 13) (original bold omitted, emphasis added). This quite plainly asks the Court to engage in a 20/20 hindsight analysis based solely on what the video shows (i.e., what "***you*** can plainly see") and disregards the deputies' unrebutted testimony as to what they ***did*** see. It affords zero discretion to their on-the-spot judgment and perception of the events in the moment, to their reaction time, or to what Petitioner calls their "sight line" at that moment. The Sixth

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[8] Similarly, Petitioner attempts to make an issue out of the fact that Jayroe was CIT trained, but that Wiggins and Paschal were not. (Pet'r's Br. 6). But neither clearly-established law nor Sheriff's Office policy required them to be specially-certified to respond to a call about an armed suspect. *See Carlson v. Jetter*, No. 1:08-CV-991, 2013 WL 12177063, at *4 (W.D. Mich. Mar. 29, 2013) ("Whether the [Emergency Support Team] would have handled the situation differently has minimal relevance to whether Defendant used excessive force in November 2007."). They were trained Sheriff's Deputies and they were the closest ones to the scene when the call went out, so they responded. (*See* Wiggins BPSI Statement, RE 89, PageID 405 ("I just happened to be in the east end that day."); Jayroe BPSI Statement, RE 90, PageID 410 (". . . there wasn't anybody that was responding and we were close.")).

Circuit correctly recognized that Wiggins and Paschal did not have the ability to pause or rewind this event, or to view it from the exact perspective of the dashcam. They were given one chance to both process what was happening and to react, knowing that making the wrong decision could get them killed. These are the kinds of split-second decisions *Graham* and qualified immunity protect.

II. PETITIONER MISCONSTRUES THE RELEVANT STANDARD OF REVIEW

Petitioner argues that the Sixth Circuit misapplied the standard of review because the video does not show all of the genuinely disputed facts in this case, and therefore that any genuinely disputed facts not shown should be inferred in his benefit. (Pet'r's Br. 24). While that legal premise is correct in the abstract, Petitioner does not actually identify any purported factual issues that the video does not resolve.

Instead, Petitioner somewhat confusingly asserts that the video does not show the events from Wiggins and Paschal's "perspective at all times." (Pet'r's Br. 3). This is a red herring because the District Court solved this purported problem by allowing Petitioner to depose Wiggins and Paschal about the events of that day. (Scheduling Order, RE 68, PageID 287 n.1) ("[T]here is a video of the shooting at issue. And Wiggins's and Paschal's depositions will show what they perceived as happening and what they knew beforehand."). Thus, to the extent the video does not show the events from Wiggins and Paschal's "perspective at all times," their deposition testimony filled that gap in the record. *See Jones v. City of Cincinnati*, 736 F.3d 688, 695-96 (6th

Cir. 2012) (an "officer's explanation of his motivations inform a court's understanding about what an objectively reasonable officer would have done under such circumstances."); *Russo v. City of Cincinnati*, 953 F.2d 1036, 1042 (6th Cir. 1992) ("[T]he reasonableness of the officer's action must be evaluated in light of the information that the defendant officer possessed at the time of the act, thus often requiring an examination of the information possessed by the . . . officials.") (citation, internal quotation marks omitted).

Petitioner also argues that the Sixth Circuit "refused to consider the deposition testimony and photographic evidence offered and introduced through Paschal . . . ." (Pet'r's Br. 3). Again, Petitioner does not actually say what material fact this evidence creates a dispute over, just generically that this evidence creates material disputes. (Pet'r's Br. 3-4). And in any event, the Sixth Circuit did not "refuse" to consider anything in the record. It did not specifically reference the photographs Petitioner mentions, but neither did it rule that they were excluded.

Although Petitioner implies throughout his brief that Wiggins and Paschal's sworn deposition testimony is unreliable, he presented no proof contradicting their sworn statements. Nor did he submit a Rule 56(d) affidavit in response to their summary judgment motion asserting that more discovery was needed. So, although Petitioner may take issue superficially with Wiggins and Paschal's credibility, for purposes of summary judgment and this appeal, their sworn depositions are unrebutted. "A respondent to a motion for summary judgment may not defeat the motion

simply by arguing that the movant's evidence may not be credible. Rather, the respondent must present affirmative evidence supporting its case." *Del Valle v. BellSouth Telecommunications, Inc.*, 200 F. App'x 528, 533 (6th Cir. 2006).[9]

There are no genuine disputes of material fact as to what happened that day because the video shows the entire event. And there are no genuine disputes of material fact as to what Wiggins and Paschal perceived as happening that day because they gave sworn deposition testimony as to what they saw (and did not see). Petitioner has not refuted their sworn testimony with any evidence and his purported "version" of what the video shows is not entitled to any presumption of correctness.

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[9] Along the same lines, Petitioner says (without any evidentiary support) that "Wiggins and Paschal were not separated after the shooting but kept together with Deputy Jayroe . . . so that they could get their stories straight . . . ." (Pet'r's Br. 18) (bold omitted). However, Petitioner does not submit any affirmative evidence to show that they actually conspired to misrepresent anything, or what fact they misrepresent. Instead, he seemingly asks the Court to infer general conspiring without any support in the record. *See Chavez v. Cty. of Kern*, No. 1:12-CV-01004 JLT, 2014 WL 412562, at *5 (E.D. Cal. Feb. 3, 2014) ("Plaintiff argues the deputies were not separated after the shooting which gave them the opportunity to conspire. Fatal to this argument, however, is that there is no evidence whatsoever that they did so conspire.").

III. PETITIONER MAKES CONCLUSORY ASSERTIONS THAT ARE UNSUPPORTED BY THE RECORD AND EVEN BLATANTLY CONTRADICTED BY THE VIDEO.

It is "well settled that the non-moving party must cite specific portions of the record in opposition to a motion for summary judgment . . . ." *U.S. Structures, Inc. v. J.P. Structures, Inc.*, 130 F.3d 1185, 1191 (6th Cir. 1997); *Nieves v. University of Puerto Rico*, 7 F.3d 270, 276 n.9 (1st Cir. 1993) ("Factual assertions by counsel in . . . briefs . . . are generally insufficient to establish the existence of a genuine issue of material fact at summary judgment."). Here, Petitioner makes numerous assertions that are either unsupported entirely and appear to be conclusory assertions of counsel, or are directly contradicted by the video evidence. Those include the following:

i. Petitioner states, without any support, that Lewellyn's 911 call was a "cry for help or attention." (Pet'r's Br. 6). This is nothing more than a conclusion in the briefing. And it is contrary to what the record shows Wiggins and Paschal were told they were walking into. (Paschal Dep., RE 83-7, PageID 373-74 ("Dispatch put out a mental violent call . . . that she was basically going to shoot herself or the first person she saw."); *accord* Wiggins Dep., RE 83-6, PageID 358 (Plaintiff's Attorney: "You knew at that point that there was a female white suspect who had been threatening suicide or to kill herself prior to that time, right? Wiggins: "Or any first responders that respond to the scene, yes.")).

ii. Petitioner states, contrary to the video evidence, that "[t]here is no proof that there was anyone else present at the scene or the immediate area prior to the shooting except Lewellyn, Paschal, Wiggins, and Deputy Jayroe." (Pet'r's Br. 7) (bold omitted). The video evidence flatly contradicts this.

(SUV 3 Dashcam, 12:14:08). This image is from Wiggins' SUV just a few seconds before he pulls up and Lewellyn walks out of her house. Lewellyn's house is the one on the right. In addition to the several civilian cars parked all around, there is clearly a person standing to the left in a red shirt, in the general direction where Lewellyn would raise her gun.

iii. Petitioner states repeatedly that Lewellyn "was attempting to surrender the bb gun on the hood of the parked car so that it would be visible and in plain

sight for all to see." (Pet'r's Br. 8). This is nothing more than a conclusory (and speculative) opinion about Lewellyn's subjective motivations, unsupported by any record evidence. Moreover, even if this conclusory assertion were true, Lewellyn's subjective intentions are not material; what matters is what a reasonable officer "could have reasonably believed" she was doing. *Goodrich v. Everett*, 193 F. App'x 551, 557 (6th Cir. 2006); *Stevens-Rucker v. City of Columbus, OH*, 739 F. App'x 834, 840 (6th Cir. 2018) (". . . in the absence of overt statements by [the suspect] to the officers, [the suspect]'s actual motives for his movements are not relevant to this inquiry because they are not known to the reasonable officer at the time of the incident.") (citation omitted). Furthermore, once on the hood the gun was ***not*** visible and in plain sight; quite the opposite, even the District Court agreed that the deputies did not "perceive[ ] Lewellyn put the gun on the car's hood." (District Court Order, RE 112, PageID 736; Sixth Circuit Order, RE 117, PageID 767). Petitioner presents no evidence to suggest that the deputies should have inferred that Lewellyn exited her house in order to surrender her gun, rather than to shoot them or others as she said she would.

iv. Petitioner "alleges that Paschal shot Nancy Lewellyn immediately ***before*** the bb gun was slightly raised . . . while the bb gun was down by her side, causing the reaction from Nancy Lewellyn to ***involuntarily*** raise the bb gun . . . ." (Pet'r's Br. 12) (first emphasis in original, second emphasis added). These conclusory, speculative assertions are found nowhere except in Petitioner's briefs, and are blatantly contradicted by the video. The video plainly shows

Lewellyn begin to raise the gun up and out toward the cul-de-sac ***before*** Paschal fired his first shot. (SUV 1 Dashcam, 12:14:11-13). Both Courts below disagreed with Petitioner's argument on this point and his assertion to the contrary is blatantly contradicted by the video.

v. Petitioner states that Lewellyn "**never** pointed the bb gun at and/or in the vicinity where Wiggins and Paschal [ ] were located at the time that the first shots were fired." (Pet'r's Br. 17) (bold in original). The video does not support Petitioner's characterization. Immediately after the first shot (and after she began to raise the gun, pointed out toward the cul-de-sac), Lewellyn began rotating her body and gun "from her driveway toward Paschal . . . ." (District Court Order, RE 112, PageID 723).[10]

[10] The District Court also found that, when she first walked through her door, Lewellyn appeared to "raise[ ] the gun in the SUV's general direction." (District Court Order, RE 112, PageID 714) (citing SUV 1 Dashcam, 12:14:08).

(District Court Order, RE 112, PageID 722, Figure 5). Once again, Petitioner's assertion is blatantly contradicted by the record.

vi. Lastly, Petitioner claims in his Petition that there is a dispute regarding how much information Paschal actually had concerning the nature of the call. (Pet'r's Br. 5). This is a new argument that Petitioner has not previously made, and should be deemed waived.

CONCLUSION

In less time than it takes to read this sentence, Nancy Lewellyn had walked out of her front door, raised the gun once in the SUV's general direction, and was beginning to raise it again, this time pointed out toward her surrounding neighborhood. That is the

amount of time Paschal had to see, process what he was seeing, and react. Wiggins had even less time because he arrived as Lewellyn was exiting the house, gun raised. After being shot, Lewellyn then panned the gun toward Paschal. The deputies could not pause or rewind what they were seeing. In this haze, Wiggins and Paschal responded reasonably to what they perceived as a person ready to shoot them, herself, or her neighbors. This is what qualified immunity protects. Wiggins and Paschal request that this Court deny the Petition. Alternatively, they request that the Court summarily affirm the Sixth Circuit's decision.

Respectfully submitted,

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