No. _____

In The
Supreme Court of the United States

RANDALL GREER, Individually and
as Personal Representative of the
Estate of Christopher Greer, Deceased,

Petitioner,

v.

JAMES HAMAN, Cpl., Individually and as an Employee
in his Official Capacity, and DIOMEDIS CANELA, Deputy,
Individually and as an Employee in his Official Capacity,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A law enforcement officer's use of deadly force in self-defense is not constitutionally unreasonable. Courts throughout the nation universally agree that deadly force is justified under the Fourth Amendment when a reasonable officer has probable cause to believe there is a threat of serious physical harm to themselves or to others. The question presented is whether a jury should be instructed on this core principle of law. In the decision below, the district court gave a standard *Graham v. Connor*, 490 U.S. 386, 396 (1989), instruction on reasonableness of non-deadly force that was affirmed on appeal after the Eleventh Circuit concluded the *Graham* factors outlined in its standard jury instruction accurately stated the law on reasonableness for all excessive force cases. The Eleventh Circuit's one-size-fits-all approach to the question of deadly force conflicts with the prevailing law of this Court in *Tennessee v. Garner*, 471 U.S. 1 (1985), and with that of other circuits. Resolution of this conflict is essential to unify the law on this vitally important public policy question.

The specific questions presented are:

- Does the reasonableness of deadly force in self-defense turn on whether the officer had probable cause to believe there was a threat of serious physical harm to a law enforcement officer or to others?
- Does a jury instruction on *Graham v. Connor* accurately state the law regarding the reasonableness of deadly force in self-defense?

PARTIES TO THE PROCEEDING

Petitioner Randall Greer is the named plaintiff in the district court proceeding who appealed the final judgment.

Respondents James Haman and Diomedis Canela are the named defendants in the district court proceeding and appellees in the circuit court proceeding.

RULE 29.6 STATEMENT

None of the petitioners is a nongovernmental corporation. None of the petitioners has a parent corporation or shares held by a publicly traded company.

STATEMENT OF RELATED CASES

The proceedings below in federal trial and appellate courts identified below are directly related to the above-captioned case in this Court.

- *Randall Greer v. Sheriff Wayne Ivey, Town of Indialantic, James Haman, Diomedis Canela*, Case No. 15-Cv-00677-CEM-GJK (S.D. Fla. August 19, 2020).
- *Randall Greer v. Sheriff Wayne Ivey, Town of Indialantic, James Haman, Diomedis Canela*, Case No. 17-14048, 767 F. App'x 706 (11th Cir. March 25, 2019).
- *Randall Greer v. James Haman and Diomedis Canela*, Case No. 20-13542-HH (11th Cir. July 25, 2022).

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

OPINIONS BELOW

The opinion of the Court of Appeals is available at 2022 WL 2914471 (11th Cir. 2022), and is found at Appendix (App.) 1. The Court of Appeals' order denying Petitioners' timely petition for rehearing and rehearing *en banc* was entered September 16, 2022, and is found at App. 61. The order of the United States District Court for the Southern District of Florida denying the Estate's motion for new trial is available at 2020 WL 5678725 (S.D. Fla. 2020), and is found at App. 25.

JURISDICTION

Petitioners seek review of the decision of the United States Court of Appeals for the Eleventh Circuit entered on July 25, 2022. Timely petitions for rehearing and rehearing *en banc* were denied on September 16, 2022. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment of the U.S. Constitution:

> 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.

U.S. Const. amend. IV.

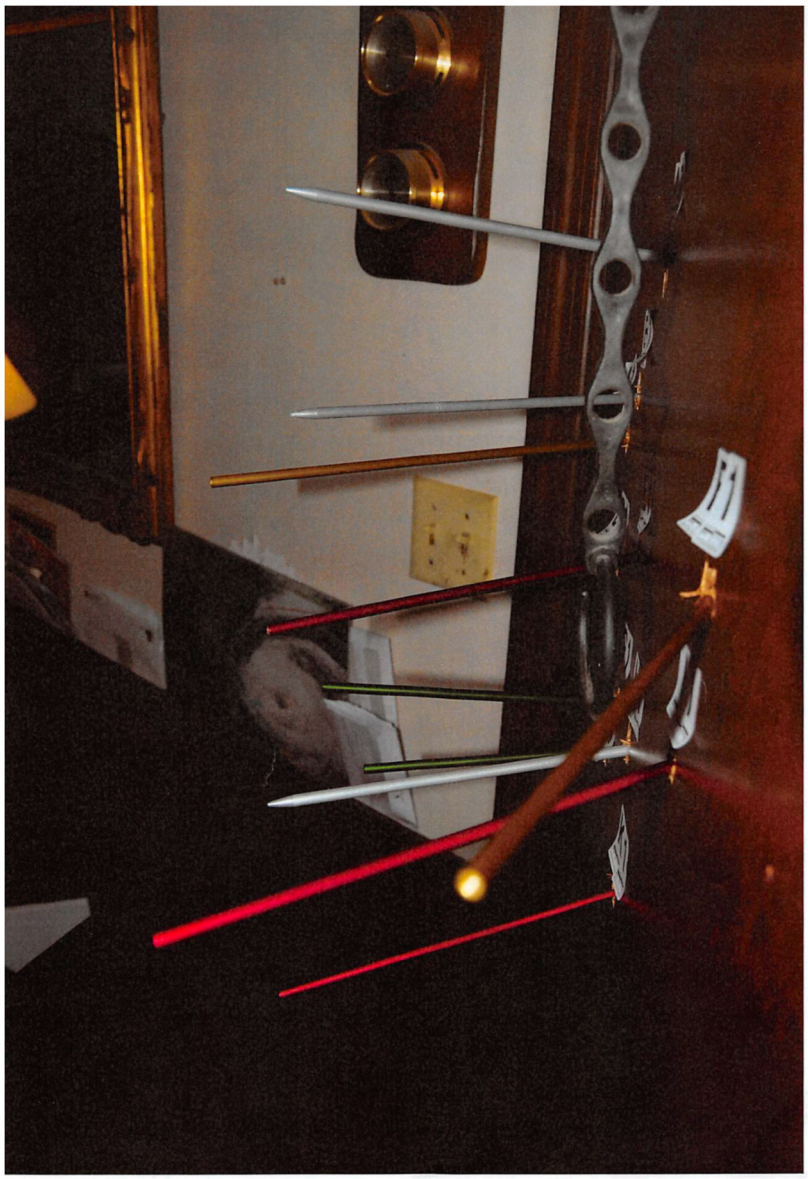
Section 1983 of Title 42 of the United State Code, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983.

STATEMENT OF THE CASE

On January 13, 2013, Christopher Greer was alone inside his home when two Brevard County, Florida deputy sheriffs shot him to death through the closed garage door (DE423:31-33, 180-181). The heavily armed deputies claimed Greer had a knife and that they shot him in self-defense (DE423:65, 243). However, the only knife found on or near Greer's hand was securely encased in a sheath on his hip (DE423:61, 187; DE431:157). A second, Frost Cutlery knife, was broken into two pieces and wrapped in a trench coat (DE431:157). But neither deputy claimed this was the knife, or even similar to the knife Greer allegedly held in his hand (DE423:196-197). The undisputed evidence was that both deputies fired twelve of the thirteen bullets into and through Greer's garage door (DE429:205; DE431:193). Even the defense expert conceded that the twelve bullet holes indicated the door was closing when the deputies opened fire (DE425:208).



On interlocutory appeal, the lower court in *Greer v. Ivey*, 767 F. App'x 706, 710 (11th Cir. 2019), remanded

the case for a jury trial on the excessive force and battery/assault claims. It contended that the reasonableness of the deputies' use of deadly force "turn[ed] on whether, in the moment before the shooting, the deputies reasonably believed that Christopher posed an immediate threat to their safety."

At trial, both parties requested jury instructions on the use of deadly force (DE367-10:30-35). The district court declined, instead giving the *Eleventh Circuit Standard Jury Instruction* 5.4 Civil Rights—42 U.S.C. § 1983 Claims Alleging Excessive Force, that outlines the *Graham v. Connor* multi-factors for assessing the reasonableness of nondeadly force while making a lawful arrest. As such, the jury was instructed as follows (DE415:10):

> When making a lawful arrest, an officer has the right to use reasonably necessary force to complete the arrest. Whether a specific use of force is excessive or unreasonable depends on factors such as the crime's severity, whether a suspect poses an immediate violent threat to others, whether the suspect resists or flees; the need for application of force, the relationship between the need for force and the amount of force used, and the extent of the injury inflicted.

Applying this multifactored instruction, the jury found for the defendants. Plaintiff/appellant appealed the failure to instruct the jury on the law applicable to deadly police shootings in purported self-defense. A panel of the lower court found no error, after finding

that the pattern *Graham* instruction sufficiently poses the question of whether the use of deadly force is reasonable. *Greer v. Ivey*, No. 20-13542, 2022 U.S. App. LEXIS 20423, at *21 (11th Cir. July 25, 2022).

Appellant's petition for rehearing *en banc* and a panel rehearing was denied.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH SUPREME COURT PRECEDENT AND CONFLICTS WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL AS TO THE REASONABLENESS OF DEADLY FORCE.

A. Courts analyzing the reasonableness of deadly force rely on clearly established legal rules. The deliberating jury must rely on the same key legal principles.

The Fourth Amendment to the U.S. Constitution and the Civil Rights Act protect against unreasonable force by law enforcement acting under color of law. "The reasonableness of the force used can depend on a number of factors." *Cantu v. City of Dothan*, 974 F.3d 1217, 1229 (11th Cir. 2020). In *Graham v. Connor*, 490 U.S. 386, 396 (1989), this Court articulated several factors for consideration of reasonableness, "including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers

or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."

However, "[n]ot ***all*** of the factors are relevant to ***all*** excessive force cases." 974 F.3d at 1229 (emphasis added). The *Graham* Court expressly "reject[ed] this notion that all excessive force claims brought under § 1983 are governed by a single generic standard." 490 U.S. at 393. "Use of deadly force indisputably implicates weighty individual interests." *Penley v. Eslinger*, 605 F.3d 843, 850-51 (11th Cir. 2010). In the context of deadly force, factors more exacting than *Graham* govern reasonableness. These factors are clearly established. In a police shooting case challenging an officer's claim of deadly force in self-defense, reasonableness turns on whether the person (often shot to death and unavailable as a witness) posed an imminent threat of death or serious bodily injury to the officer or others. *Kenning v. Carli*, 648 F. App'x 763, 767 (11th Cir. 2016). The law is well settled that an officer may "use deadly force to defend himself against a suspect's use of deadly force." *O'Neal v. DeKalb County*, 850 F.2d 653, 657-58 & n. 7 (11th Cir. 1988); *Adams v. Bradshaw*, 658 F. App'x 557, 563 (11th Cir. 2016).

The corollary rule applies equally: "deadly force is not justified where the suspect poses no immediate threat to the officer and no threat to others." *Perez v. Suszczynski*, 809 F.3d 1213, 1222 (11th Cir. 2016); *Smith v. LePage*, 834 F.3d 1285, 1296 (11th Cir. 2016) (deadly force unreasonable when there was no probable cause to believe plaintiff posed a threat of serious physical harm); *Hunter v. Leeds*, 941 F.3d 1265, 1280

(11th Cir. 2019) (same). *See also Singletary v. Vargas*, 804 F.3d 1174, 1184 (11th Cir. 2015) ("[I]t is well established that an officer may constitutionally use deadly force when his life is threatened by a car that is being used as a deadly weapon."); *Robinson v. Arrugueta*, 415 F.3d 1252, 1256 (11th Cir. 2005) (same); *Salvato v. Miley*, 790 F.3d 1286, 1293-94 (11th Cir. 2015) (reasonableness of deadly force turned on whether citizen threatened life).

This Court has not addressed the parameters of deadly force in claims of self-defense. The Court's deadly force jurisprudence has primarily addressed the reasonableness of deadly force to prevent escape. Still, the circuits agree that the reasonableness of deadly force in self-defense turns on "[w]hether the officer had probable cause to believe that the suspect posed a threat of serious physical harm to the officer or others." *Prosper v. Martin*, 989 F.3d 1242, 1251 (11th Cir. 2021) (internal citations omitted); *Horton v. Pobjecky*, 883 F.3d 941, 949 (7th Cir. 2018) ("a police officer may constitutionally use deadly force to defend himself and others in certain situations"); *Jiron v. City of Lakewood*, 392 F.3d 410, 415 (10th Cir. 2004) ("In other words 'an officer's use of deadly force in self-defense is not constitutionally unreasonable.'" (quoting *Romero v. Bd. of County Comm'rs*, 60 F.3d 702, 703-04 (10th Cir. 1995) (holding that officer acted reasonably in shooting suspect coming at him with knife in attack position)); *Chappell v. City of Cleveland*, 585 F.3d 901, 911 (6th Cir. 2009).

Every Circuit Court of Appeals addressing whether a jury should rely on these same legal principles in cases involving the same context—a police shooting in self-defense—has answered in the affirmative, through either decisional law or pattern jury instructions. The Eleventh Circuit's decision represents a significant departure from this precedential standard and invites the type of community apprehension of police conduct that led to the nationwide George Floyd protests against excessive police use of force. Public trust and confidence in our government institutions is critical to the functioning of our democratic republic. The Eleventh Circuit's one-size-fits-all standard instruction diminishes public confidence by treating the use of deadly force in self-defense as the same as the use of nondeadly force when engaging with the public.

In *Rahn v. Hawkins*, 464 F.3d 813, 817 (8th Cir. 2006), law enforcement used deadly force against a bank robber who was "surrendering without a struggle." At trial, he asked for the jury to be instructed on the circumstances under which deadly force could be used: "if the officer has probable cause to believe that a suspect poses a threat of serious physical harm to the officer or others." *Id*. at 817. The district court did not, opting instead to give the standard general instruction on excessive force under *Graham*.

The Eighth Circuit reversed. The Court reasoned: "The problem with giving only the more general excessive-force instruction is that it may mislead the jury as to what is permissible under the law." *Id.* at 818. "Jury instructions that discuss only excessive force in only a

general way do not adequately inform a jury about when a police officer may use deadly force." *Id*. According to the Court:

> One can easily imagine a jury, having been given only the general standard, concluding that an officer was "objectively reasonable" in shooting a fleeing suspect who posed no threat to the officer or others. But such a result would be contrary to the law and would work an injustice to the injured plaintiff.

Id. The error was not harmless in *Rahn v. Hawkins* because the jury was improperly instructed as to deadly force and "[t]he sole issue at trial was whether the defendants' use of force was justified." *Id*. at 818.

In *Rasanen v. Doe*, 723 F.3d 325, 333 (2d Cir. 2013), the Second Circuit found plain error in the failure to instruct the jury on the use of deadly force in a civil rights case challenging a claim of deadly force in self-defense. While executing a search warrant, the defendant officer claimed he shot an occupant of the home in self-defense "out of fear for his own life." *Id*. at 329. The plaintiff argued on appeal that the failure to instruct the jury on deadly force was erroneous. *Id*. at 332. The defendant officer argued that under *Graham* and *Scott v. Harris*, 550 U.S. 372 (2007), special instructions on deadly force were not required.

The Second Circuit reversed, agreeing with the plaintiff that "[i]n a case involving use of force highly likely to have deadly effects, an instruction regarding justifications for the use of deadly force is required." *Id*.

The Second Circuit reasoned that the law governing the use of deadly force was "**clearly established**" and that "juries confronted with similar fact patterns must be instructed accordingly." *Id*. (emphasis added).

More significant is the Second Circuit's plain error analysis. Although the instruction issue was not preserved for appellate review, the Second Circuit determined the failure to instruct on deadly force was plain error. *Id*. at 333. The *Rasanen* court acknowledged that the "failure to instruct the jury on the basis of clearly established and crucially relevant law fatally subverted the trial's integrity." *Id*. at 335. *See also Terranova v. New York*, 676 F.3d 305, 308-09 (2d Cir. 2012).

In *Clem v. Corbeau*, 98 F. App'x 197, 201 n. 1 (4th Cir. 2004), the Fourth Circuit concluded that instructions that deadly force was "not justified unless there was probable cause to believe that there was a threat of serious harm to the defendant or others" adequately stated the law governing use of deadly force. *Clem v. Corbeau*, 98 F. App'x 197, 201 n. 1 (4th Cir. 2004). The Fourth Circuit reasoned that the instruction "adequately informed the jury of the controlling legal principles without misleading or confusing the jury to the prejudice" of the plaintiff. *Id*. (internal citations omitted).

Beyond the Second, Fourth, and Eighth Circuit decisional law, pattern jury instructions from the Third, Fifth, and Seventh Circuits provide for specific instructions on the use of deadly force.

The Third Circuit Court has a separate pattern instruction for *Garner*-Type Deadly Force Cases:

> An officer may not use deadly force to prevent a suspect from escaping unless deadly force is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. . . .
>
> In order to establish that [defendant] violated the Fourth Amendment by using deadly force, [plaintiff] must prove that [defendant] intentionally committed acts that constituted deadly force against [plaintiff]. . . . In addition, [plaintiff] must prove [at least one of the following things]:
>
> - deadly force was not necessary to prevent [plaintiff's] escape; or
> - [defendant] did not have probable cause to believe that [plaintiff] posed a significant threat of serious physical injury to [defendant] or others; or
> - it would have been feasible for [defendant] to give [plaintiff] a warning before using deadly force, but [defendant] did not do so.

Third Circuit Court of Appeals Pattern Civil Jury Instruction 4.9.1 Section 1983—*Garner*-Type Deadly Force Cases.

The Fifth Circuit Court of Appeals *Pattern Jury Instructions (Civil Cases)* 10.1 42 U.S.C. Section 1983 (Unlawful Arrest—Unlawful Search—Excessive Force) n. 28, expressly advises that its *Graham*-factor instruction be modified in a deadly force case:

> This instruction should be revised in a deadly force case. *See*, *e.g.*, *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). The "[u]se of deadly force is not unreasonable when an officer would have reason to believe that the suspect poses a threat of serious harm to the officer or others." *Mace v. City of Palestine*, 333 F.3d 621, 624 (5th Cir. 2003).

Finally, jurors within the jurisdiction of the Seventh Circuit rely on this comprehensive *Pattern Civil Jury Instruction* 7.10 Fourth Amendment: Excessive Force Against Arrestee-Definition of "Unreasonable," that similarly informs on the legal requirements for deadly force:

> [An officer may use deadly force when a reasonable officer, under the same circumstances, would believe that the suspect's actions placed him or others in the immediate vicinity in imminent danger of death or serious bodily harm. [It is not necessary that this danger actually existed.] [An officer is not required to use all practical alternatives to avoid a situation where deadly force is justified.]]

B. The more lenient *Graham* standard addresses the reasonableness of non-deadly force while making a lawful arrest and is therefore inapplicable to a case involving the purported use of deadly force in self-defense.

In the proceeding below, **both** parties affirmatively asked the district court to instruct the jury on the legal principles governing deadly force (DE367-10:30-35). The district court did not, opting instead to give only *Standard Jury Instruction* 5.4 Civil Rights—42 U.S.C. § 1983 Claims Alleging Excessive Force, the standard instruction codifying the general *Graham* factors (DE415:10; DE429:292). *Standard Jury Instruction* 5.4 is the only instruction on excessive force in the Eleventh Circuit. This was error because the *Graham* factors do not accurately reflect the law governing the use of deadly force in self-defense.

The question of the *Graham* factors' applicability to self-defense, deadly force cases begins with *Graham* and the factual context in which *Graham* was decided. 490 U.S. 386. *Graham*'s plaintiff sought damages for injuries sustained when law enforcement used physical force against him during a lawful investigatory stop. *Id*. at 388. The force used was nondeadly. Police tied his hands tightly behind his back and threw him headfirst inside a police car. *Id*. at 389. His injuries were also nondeadly: he sustained a broken foot, cuts on his wrists, a bruised forehead, an injured shoulder, and persistent ringing in his ears. *Id*. at 390.

This Court began by making "explicit what was implicit in *Garner's* analysis" and held that "all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment." *Id*. at 395. The Court then defined how that rule would apply to the facts before it—nondeadly force while effectuating a lawful arrest. In so doing, the Court acknowledged that "**the right** to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Id*. at 396 (emphasis added). It further acknowledged that the test for reasonableness "is not capable of precise definition or mechanical application . . . however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id*. (internal citations omitted).

The Eleventh Circuit's pattern *Graham* instruction is only true to *Graham*'s factual context. Jurors given *Standard Jury Instruction* 5.4 are told, "**When making a lawful arrest, an officer has the right to use reasonably necessary force to complete the arrest**." (emphasis added). This is the exact factual issue addressed by *Graham* and does not invoke any deadly force analysis. After being read the *Graham* factors, the jury is then told to "decide whether

the force [name of defendant] used in making the arrest was excessive or unreasonable based on the degree of force a reasonable and prudent law enforcement officer would have applied in making the arrest under the same circumstances." *See Prevatt v. City of Gainesville*, No. 1:14cv145-MW/GRJ, 2016 U.S. Dist. LEXIS 3545, at *18 (N.D. Fla. Jan. 12, 2016) ("All of the *Graham* factors suggest a justifiable use of nondeadly force in effecting the seizure.").

In many excessive force cases, the *Graham* standard instruction correctly states the law governing the reasonableness of nondeadly force while effectuating a lawful arrest. But these principles have no bearing on the question of whether an officer reasonably acted in self-defense by using deadly force to protect the officer's own life. The legal requirements for **deadly force in self-defense** are clear and well established, and significantly differ from the *Graham* nondeadly force analysis.

Due to the clear and alarming conflict within the circuits, this Court should resolve and clarify the status of the law as to law enforcement use of deadly force in self-defense, because the *Graham* test is less stringent than the *Garner* test, for the simple fact that *Garner* asks "whether 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 U.S. 1, 11 (1985) (emphasis added). *Graham* does not. Circuit Judge Anthony Scirica, in the concurring part of his opinion affirming the denial of

summary judgment, succinctly articulated this key difference between *Garner* and *Graham*:

> As should be clear, if *Graham* is the appropriate standard by which to determine the constitutionality of the use of force here, then general reasonableness factors would guide a jury's determination as to whether excessive force was used. By stark contrast, *Garner* would not invite a jury to be guided by the more flexible general reasonableness standard. ***Garner* imposes a stricter standard governing police conduct** and the use of excessive force—and with good reason, since the intrusiveness of deadly force is qualitatively distinct from all other forms of excessive force. Accordingly, *Garner* defines and explains the reasonableness of the excessive force to which it is addressed—deadly force—in narrower terms. . . . Thus, if *Garner* were applied, a jury would be asked more pointedly to determine whether the deadly force employed was reasonable because it was necessary to prevent the escape of suspects believed to pose a significant threat of death or serious physical injury to the police or others. **It is this test, and not the more lenient *Graham* standard**, by which the propriety of the law enforcement officers' decisions in this case should be gauged. And, as I have already indicated, I believe that under *Garner* only one reasonable conclusion can be reached here: the city defendants used excessive force.

Africa v. City of Phila. (In re City of Phila. Litig.), 49 F.3d 945, 978 (3d Cir. 1995) (Scirica, Circuit Judge, concurring and dissenting).

The underlying case involved the identical factual and legal question: Did law enforcement shoot the decedent in self-defense? The panel's analysis of whether its standard *Graham* instruction correctly states the law governing reasonableness addressed the wrong question. The correct question is whether a *Graham* standard instruction is a **correct statement** of the law governing the reasonableness of **deadly force in self-defense**. The answer is no. No court's qualified immunity analysis has relied on *Graham* to the exclusion of *Garner*'s more exacting requirements for deadly force. Asking a jury of laymen to decide the reasonableness of deadly force without considering these same clearly established principles "fatally subvert[s] the trial integrity." *Rasanen*, 723 F.3d at 335. It is so far outside the ambit of acceptable jury instructions as articulated by federal case law and pattern jury instructions as to warrant a new trial because of the "substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations." *Carter v. DecisionOne Corp.*, 122 F.3d 997, 1005 (11th Cir. 1997) (citation omitted). This Court should grant certiorari to unify and clarify the legal requirement of law enforcement use of deadly force in self-defense.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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