No. 23-

IN THE

Supreme Court of the United States

TRAVIS PALMER CURRAN, KEELIE KERGER AND BILL HIGDON,

Petitioners,

v.

JANET TURNER O'KELLEY, JOHN ALLEN TURNER, FRANK GARY HOLLOWAY AND TODD MUSGRAVE,

Respondents.

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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QUESTIONS PRESENTED

1. Whether the Fourth Amendment objective reasonableness standard for exigency, and the availability of qualified immunity itself, remain questions of law applied to the facts after disputes are resolved in favor of the nonmoving party; or whether and to what extent they implicate questions which must be left to the jury.

2. Whether, in light of (1), the Eleventh Circuit Panel erred by denying qualified immunity on grounds that a jury could find the officers could not objectively believe the circumstances they faced constituted exigency as an exception to the Fourth Amendment's requirements for lawful seizure.

3. Whether the Fourth Amendment's objective reasonableness standard for exigency, and the question of whether an officer violated a clearly established right, have evolved to include consideration of subjective elements contrary to this Court's established precedent.

4. Whether, in light of (3), the Eleventh Circuit Panel erred by holding that a jury should determine what officers subjectively understood in order to establish the reasonableness of their actions under the Fourth Amendment, and that evidence of an officer's subjective state of mind as to whether a suspect posed a threat precluded the grant of qualified immunity.

5. Whether the Eleventh Circuit erred in holding that a general principal of law, that the Fourth Amendment prohibits seizure within the curtilage of the home absent a warrant or exigent circumstances, established with the

requisite degree of particularity that the officers violated clearly established law in the particular circumstances they faced.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit were Petitioners Travis Palmer Curran, Keelie Kerger, and Bill Higdon; Respondents Janet Turner O'Kelley and John Allen Turner; and Frank Gary Holloway and Todd Musgrave.

RELATED CASES

O'Kelley, et al. v. Craig, et al., No. 2:17-CV-215, U.S. District Court for the Northern District of Georgia. Judgment of Dismissal Entered September 27, 2018. Summary Judgment entered February 2, 2022.

O'Kelley, et al. v. Craig, et al., No. 18-14512, U.S. Court of Appeals for the Eleventh Circuit. Judgment reversing dismissal entered July 16, 2019.

O'Kelley, et al. v. Craig, et al., No. 22-10600, U.S. Court of Appeals for the Eleventh Circuit. Judgment reversing summary judgment entered April 11, 2023.

Craig, et al. v. *O'Kelley, et al.*, No. 19-956, Certiorari Denied April 6, 2020.

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INTRODUCTION

Harley Turner, an armed suspect who was reported threatening nearby raccoon hunters in the North Georgia mountains with bodily harm, died after a nighttime armed standoff with multiple law enforcement officers deteriorated into gunfire when Turner was shot with a nonlethal beanbag round.

Upon the Petitioner officers' motion for summary judgment, the district court granted them qualified immunity, holding in relevant part that they had arguable probable cause to enter the property and exigent circumstances existed to do so, and therefore they did not violate Harley Turner's Fourth Amendment rights; and that, under clearly established law, a reasonable officer in this situation would have believed that violence was imminent, such that exigent circumstances existed, so the Petitioners were entitled to qualified immunity.

A Panel of the Eleventh Circuit, however, reversed the district court in parts relevant to this Petition. The Panel held that the question of whether an objectively reasonable officer would believe exigency existed was a question for the jury; that a jury could find the officers' conduct objectively unreasonable based on what the officers *subjectively* believed about the situation; and it denied qualified immunity on grounds that "clearly established law" to the effect that the Fourth Amendment prohibits seizures in the curtilage of the home absent a warrant or exigent circumstances.

The Panel's decision adds fuel to the fire of circuit splits across the nation on both the degree to which subjective

factors should be taken into account in determining reasonableness of an officer's belief in the existence of exigency, if at all; and it joins other circuits' inconsistencies where it shuns pure questions of law—such as objective reasonableness once facts are established on summary judgment, and whether clearly established law prohibits conduct on those facts—in favor of jury determination. It also joins the ranks as the latest in a long march of appellate decisions ignoring this Court's repeated admonishments, not to define "clearly established law" at such a high level of generality in qualified immunity analysis, such that the guiding principle is nothing more than a restatement of the law itself, rather than analyzing factually instructive precedent.

The Court should grant certiorari in order to resolve these circuit splits and unequivocally announce that, at least in the qualified immunity context, the existence of some arguable factual disputes on the underlying merits does not prevent summary judgment on qualified immunity grounds where, independently, clearly established law does not proscribe the officers' conduct as described once all factual disputes are resolved in favor of the nonmovant.

OPINIONS BELOW

The decision of the U.S. Court of Appeals for the Eleventh Circuit reversing the district court's grant of summary judgment is reported at 2023 WL 2889246 and reproduced in the Appendix at 1a. The district court's unreported decision granting the deputies qualified immunity and summary judgment is available at 2022 WL 610797 and reproduced in the Appendix at 33a. The Eleventh Circuit's unreported order denying the petition

for rehearing or in the alternative rehearing en banc is reproduced in the Appendix at 109a.

The decision of the U.S. Court of Appeals for the Eleventh Circuit reversing the district court's dismissal is reported at 781 fed. Appx. 888 and reproduced in the Appendix at 63a. The district court's unreported decision granting the deputies qualified immunity and ordering dismissal is available at 2018 WL 463638 and reproduced in the Appendix at 86a. The Eleventh Circuit's unreported order denying the petition or rehearing or in the alternative rehearing en banc is reproduced in the Appendix at 111a.

JURISDICTION

The Eleventh Circuit issued its order denying the Deputies' petition for rehearing or in the alternative rehearing en banc on July 14, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. IV, provides:

> 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.

42 U.S.C. § 1983 provides in relevant 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 . . .

STATEMENT OF THE CASE

A. Factual Background

The District Court's and Eleventh Circuit's findings of fact are not contested.

On October 24, 2015, at around 8:30 p.m., Kevin Moss called 911 and reported that he and a group of individuals had been hunting when a person on the neighboring property yelled through the woods, accusing them of trespassing and threatening to shoot them. Moss believed the person was drunk and told the 911 operator, "This son of a bitch is crazy." He later specified that the man threatened to "shoot us, shoot our dogs, he was going to cut us up for Halloween."

Pickens County Deputies—the Petitioners Higdon, Kerger, and Holloway—responded two the call. There they met the hunters—two adults and two children—near the property. The hunters reiterated the threats that

the man in the woods had made—that he was yelling at them, "threatening to shoot them and cut off their arms and legs and feed them to dogs." But they indicated they could not see whether the person was armed since it was dark outside. They also reported observing the man in a heated argument with an older man, who turned out to be Stan O'Kelley.

Based on what the hunters told them, the deputies proceeded to the neighboring O'Kelley property. There, they were met by Stan O'Kelley (Janet's husband and Harley's stepfather). He told the officers that he owned the property, that the 911 call was about his stepson, and that Harley was armed. Stan also told the deputies that Harley lived in a building behind his and Janet's own home. He also told the deputies that Harley was "out of his ever-loving mind" and that he had two guns—a ".45 and an SKS" (an automatic rifle).

While the deputies spoke to Stan, they noticed Harley approaching the other side of a closed gate in the lower driveway of the property. They saw that Harley was shirtless, had a spotlight in his left hand, and a handgun in his right hand. Harley was wearing a makeshift bandolier with the holster across his chest. The deputies did not see the SKS anywhere. When the deputies saw that Harley was holding a handgun, they raised their own guns, pointed them at Harley, and ordered him to put his hands up, drop the gun, and get on the ground. They told him that they were police officers and wanted to talk.

Harley responded by telling the deputies they were trespassing. The deputies repeatedly yelled at Harley to put the gun down. When Harley did not, one officer told the others to "Get cover."

Harley began beaming his spotlight on each of the deputies and waving the gun around by pointing it wherever the light was shining. Harley made "sweeping passes" with the gun and the spotlight, aiming the spotlight and temporarily blinding the deputies as he did so. All the while, Harley asked nonsensical questions and repeatedly accused the police of trespassing and stealing his property from him. Harley also told the deputies to leave, walked away from them, cursed at them, and encouraged them at various times to "shoot [him] in the back" and "open fire.

At some point, Harley holstered his gun across his chest. While this was going on, Stan repeatedly interjected, yelling at Harley, even though the deputies asked him to stand back or go inside. Stan's actions, which took place on the upper driveway and included his argument with Harley, forced the deputies to move him from the area more than once, until the deputies finally convinced Stan to wait at the neighbor's house for the remainder of the encounter. Based on Harley's behavior and refusal to surrender his gun, the deputies took cover behind trees and bushes on the sides of the driveway and they called for backup. Deputy Holloway requested that back-up bring less-than-lethal weapons support.

After several minutes of back and forth with the deputies, Harley turned and headed from the lower driveway to the upper driveway of the property, where Deputies Higdon and Kerger followed without crossing the fence line. Deputy Holloway remained at the lower driveway for the duration of the encounter.

At the upper driveway, Harley began pacing back and forth in the yard behind the fence, coming in and out of the deputies' sight. His gun was holstered, for the time being.. When Harley approached the fence line, he again repeatedly aimed his spotlight into the deputies eyes. Harley then disappeared into the building where he lived.

Additional law-enforcement officers arrived on the scene, including Georgia State Patrol Officers, who took up sniper positions with their rifles, and Appellees Sergeant Curran and Deputy Musgrave, who joined the other deputies.

Sergeant Curran was called to the scene because he was equipped with a nonlethal beanbag gun. At the upper driveway, as various deputies instructed Harley to talk with them and put his firearm down, Harley was unwilling to do so, and he continuously accused the deputies of trespassing and stealing. No fewer than 13 times, Harley told the officers to shoot him. He interjected these outbursts with statements that he wanted to go to bed. As Harley refused to put his firearm down, the deputies formed a plan to use nonlethal force—Curran's beanbag gun—in an attempt to disarm him. Curran, however, believed that deployment of the beanbags would not be effective from where he was positioned, so he would have to get closer and cross the fence line. Curran and Higdon passed a privet hedge near the O'Kelleys' house, jumped over the fence, and took positions in a narrow (non-pedestrian) alleyway between the house and fence. They then moved into the O'Kelley's backyard but retreated to the alleyway when their movement activated a floodlight.

Curran instructed the other deputies to draw Harley to the fence so Curran could shoot at Harley's right shoulder with a beanbag—Curtis gave this order with the intent to Harley down or at least to back him up and stun his right arm, with the hope that Harley would lose control of the gun in his right hand. Higdon was to provide cover for Curran.

As Curran and Higdon took position, Kerger got permission to from Curran to try to engage Harley and talk him into putting his gun down. Kerger tried to draw Harley from the driveway to the fence line, where officers could see him in the lighting and where Curran could get a good shot with the beanbags.

Kerger stepped into the open driveway, raised her hands, and approached the fence to speak with Harley. Kerger told Harley that she was unarmed, and asked him to put his gun down. Harley did not; instead, he approached the fence with his gun holstered. He still had his spotlight, along with a jug of water retrieved from his house. Harley refused Kerger's commands to place his holstered gun on the ground.

As Harley moved closer to the fence toward Kerger, he abruptly turned to the right, moved, and saw Curran. Harley lifted his arm from his side and shone his spotlight into Curran's eyes, temporarily blinding him. Blinded, Curran fired three beanbag rounds at Harley, striking him, but Harley did not go down. Harley then drew his gun and fired twice at Curran, hitting him in the elbow. In response, several other officers fired back at Harley, and Harley was killed, with the fatal round fired by an officer of the Georgia State Patrol.

B. Procedural Background

Turner's mother, Janet O'Kelly, individually and as the representative of Turner's estate filed suit in the Northern District of Georgia naming as defendants Pickens County Sheriff Donald Craig, Sargent Curran, Deputy Holloway, Deputy Kerger, Deputy Higdon, and Deputy Musgrave of the Pickens County Sheriff's Office. O'Kelley also brought suit against the state patrol officers Salcedo and Curtis. O'Kelley alleged claims under 42 U.S.C. § 1983 and state law against all defendants.

O'Kelley's original federal law claims included Fourth Amendment claims against the deputy sheriffs for unlawful seizure and excessive force. The district court granted the deputies' motion to dismiss on qualified immunity grounds.

On appeal, a Panel of the Eleventh Circuit reversed the district court's qualified immunity analysis entirely. The Panel determined that that the facts, as alleged in the Complaint, plausibly alleged that no exigency existed because it would not have been apparent to any reasonable officer that Turner presented a danger to himself, the deputies, or anyone else.

Moving to the clearly established prong, the Panel rejected the district court's careful distinctions of *Moore* and in passing held that "[*Moore v. Pederson*, 806 F.3d 1036 (11th Cir. 2015), decided on October 15, 2015, [in which] we held that an 'officer may not conduct a *Terry*-like stop in the home in the absence of exigent circumstances' . . . clearly established, at the time of the encounter on October 24, 2015, that a seizure or entry within a home without a

warrant or exigent circumstances violates the Fourth Amendment's prohibition on unreasonable searches and seizures." (80a).

The officers filed a Petition for Writ of Certiorari to this Court, which the Court denied. The matter then proceeded into merits discovery.

At the close of discovery, no excessive force claims remained. The officers filed a motion for summary judgment on the Fourth Amendment unlawful seizure claims, and the district court granted them qualified immunity, holding in relevant part that they had arguable probable cause to enter the property and exigent circumstances existed to do so, and therefore they did not violate Harley Turner's Fourth Amendment rights; and that, under clearly established law, a reasonable officer in this situation would have believed that violence was imminent, such that exigent circumstances existed, so the Petitioners were entitled to qualified immunity.

A Panel of the Eleventh Circuit reversed the district court in parts relevant to this Petition. The Panel held that the question of whether an objectively reasonable officer would believe exigency existed was a question for the jury; that a jury could find the officers' conduct objectively unreasonable based on what the officers *subjectively* believed about the situation; and it denied qualified immunity on grounds that "clearly established law" to the effect that the Fourth Amendment prohibits seizures in the curtilage of the home absent a warrant or exigent circumstances.

The Eleventh Circuit denied the Officers' motion for rehearing *en banc*, and this Petition followed.

REASONS FOR GRANTING THE PETITION

I. There Is A Circuit Split Improperly Importing Questions Of Law To The Jury On Summary Judgment, And The Eleventh Circuit Joined In The Ongoing Error.

There is a growing trend nationwide wherein the Circuit courts of Appeal deny qualified immunity at the summary judgment stage, on grounds that, if there are disputed issues of material fact—that is, if a jury could reasonably find against the movant on the merits—then summary judgment *ipso facto* must be denied. The result is that, if a jury could find that a constitutional violation occurred, the courts do not then take the trouble to resolve disputed facts in the non-movant's favor and, assuming a violation in fact occurred, ask whether the conduct violated a clearly established right. Instead, they simply punt on the clearly-established law prong of the two-prong analysis announced in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727 (1982). This trend abandons the basic framework of Fed. R. Civ. P. 56 in general; more to the point, it destroys the *Harlow* qualified immunity analysis=): (1) whether a constitutional violation occurred and (1) whether clearly established law prohibited the movant's particular conduct in the circumstances he faced. This Court should grant certiorari in order to clarify the enduring validity of the two-prong analysis and instruct the Circuit courts that the mere existence of a disputed issue of material fact on summary judgment from which a jury could find a constitutional violation occurred does not dissipate the necessity to perform the clearly established law analysis *on the basis of all facts with disputes resolved in the nonmovant's favor.*

The Eleventh Circuit itself previously recognized that "the qualified immunity defense is a question of law to be decided by the court." *Ansley v. Heinrich*, 925 F.2d 1339, 1345 (11th Cir. 1991), *citing Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.E.2d 523 (1987). And this Court, precisely in reviewing a summary judgment ruling in the qualified immunity context, has expressly stated that questions of fact are to be resolved with favorable inferences to the nonmoving party, *and then* the reviewing court is to determine an officer's objective reasonableness as a matter of law on those facts. In *Scott v. Harris*, 550 U.S. 372, 380-381 n. 8, 127 S. Ct. 1769, 1776, 167 L. Ed. 2d 686 (2007), a case involving claims of excessive force, this Court held the following:

> ""[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact….
>
> Justice Stevens incorrectly declares this [question whether an officer's actions were objectively reasonable] to be 'a question of fact best reserved for a jury,' and complains we are 'usurp[ing] the jury's factfinding function.'… At the summary judgment stage, however, once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party to the extent supportable by the record…, the reasonableness of [the officer's] actions—or, in Justice Stevens' parlance, "[w]hether [respondent's] actions have risen to a level warranting deadly force,'… is a pure question of law.") (citations and emphasis omitted).

As this Court has repeatedly emphasized, the qualified immunity analysis is a two-pronged one, in no set order: One inquiry is whether the facts establish an underlying constitutional. *Even if it does, or could*, the other inquiry is whether the right violated was "clearly established." *Both* elements of the test must be satisfied in order for an official to lose qualified immunity. *See Pearson v. Callahan*, 55 U.S. 223, 129 S.Ct. 808, 821, 172 L.Ed.2d 565 (2009). In other words, on summary judgment: if the constitutional violation test is satisfied (i.e., a jury could find there was a violation because there is a sufficient dispute on the pertinent facts), an official is still entitled to qualified immunity on the "clearly established law" prong as a pure question of law, provided no sufficiently instructive precedent corresponding to the facts *as resolved in the nonmovant's favor* is identified.

In its discussion of whether a constitutional violation occurred, the Eleventh Circuit Panel held that "a jury could find that a reasonable officer… would not have believed that exigent circumstances existed," or that a jury could find in the alternative that "a reasonable officer would have believed that… exigent circumstances justified entry onto the O'Kelleys' property." (27a.). Thus, the Eleventh Circuit converted the Fourth Amendment objective reasonableness standard for whether an exigency exception to the warrant requirement exists, from a question of law for the Court to decide on the facts at summary judgment, to simply a jury question.

The Eleventh Circuit is not alone in this category of error. The Circuit courts are awash in similar misapprehensions—sometimes, even contradicting themselves. The following give but a sampling of those

decisions that have, in addressing qualified immunity on summary judgment, converted pure questions of law into questions for the jury:

McKenney v. Mangino, 873 F.3d 75, 79 (1st Cir. 2017) (affirming district court's finding that "a rational jury could find that it was unreasonable for the defendant to believe that McKenney 'posed an immediate threat to the safety of the [defendant] or others at the time he was shot' and affirming denial of summary judgment and of qualified immunity) (quotations in original) (citation omitted).

Peroza-Benitez v. Smith, 994 F.3d 157, 166–67 (3d Cir. 2021). Here, the district court found that the officer "did not violate a clearly established constitutional right, because a reasonable officer in [his] shoes at the time in question would not have perceived federal law to preclude' his conduct." (citation omitted). The Third Circuit disagreed and reversed the grant of qualified immunity, holding that "a reasonable jury could find that [the officer's] actions violated a 'clearly established' right." *Id.*

The Fifth Circuit, in a matter involving detention to conduct a dog sniff, held that "[b]ecause there is a fact issue regarding reasonable suspicion for the dog sniff here… we cannot say whether [the officer's] actions violated a clearly established right, and we must remand." *Cedrick Otkins, Jr., Plaintiff-Appellant, v. Jack Gilboy, Sergeant, et al., Defendants-Appellees.*, No. 22-30752, 2023 WL 6518119, at *3 (5th Cir. Oct. 5, 2023) In fact, the Fifth Circuit has lately out-and-out made the question of whether an officer's conduct violated clearly established law a question for the jury to decide. *See Frank v. Parnell*,

No. 22-30408, 2023 WL 5814938, at *6 (5th Cir. Sept. 8, 2023) ("*[A] jury could conclude* that the officers used excessive force and that they had reasonable warning *that their conduct violated Frank's clearly established Fourth Amendment rights.*") (emphasis supplied).

The Sixth Circuit presents the same problem. *See Harris v. City of Saginaw, Michigan*, 62 F.4th 1028, 1036 (6th Cir. 2023) ("[B]ecause there is reason to believe that this arrest violated Harris's clearly established constitutional right, none of the Officers are entitled to qualified immunity.")

The Seventh Circuit has held that, because there were disputed facts from which a jury could conclude a plaintiff's rights to be free from excessive force, the Court could not, in turn, make any determination of whether the rights in question were clearly established. *See Taylor v. City of Milford*, 10 F.4th 800, 808 (7th Cir. 2021) ("Here, determining whether Garrett's violation of Steven's rights was clearly established in 2016 requires findings of fact, which we cannot make at this stage of the litigation. Indeed, several cases leave us with the firm conviction that… a jury could conclude that Garrett applied excessive force to Steven in violation of Steven's clearly established rights.").

The Eighth Circuit likewise: affirming the district court's holding that officers "were not entitled to qualified immunity because a reasonable jury could find they were aware of the crash, and that their failure to call for emergency medical assistance violated Neil's constitutional right under the Fourteenth Amendment," and that "it is clearly established that a custodial relationship is formed

when law enforcement officers limit an individual's freedom to act on his own behalf." *Cheeks v. Belmar*, 80 F.4th 872, 875, 877–78 (8th Cir. 2023).

These decisions directly contrast to opinions elsewhere, which create a circuit split because they continue to follow in *Scott*'s footsteps and first resolve factual disputes in favor of the nonmoving party, and then pronounce disposition of questions of law on the facts:

Penate v. Sullivan, 73 F.4th 10, 22 (1st Cir. 2023) ("Even considering the entire course of conduct together, the officers are entitled to qualified immunity because it would not have been clear to a reasonable officer that the combination of those actions violated established law. Simply put, for the same reasons that rendered the no-knock entry not clearly unreasonable, so too no sufficiently established case law made it reasonably clear that the no-knock entry could not be effected with raised guns that were lowered within a few seconds of realizing that a person was not a danger. And Penate points us to no case clearly establishing that it was clearly unreasonable to use a SWAT team under the circumstances.").

Gray v. Cummings, 917 F.3d 1, 12 (1st Cir. 2019) ("Based on the body of available case law, we hold that an objectively reasonable police officer in May of 2013 could have concluded that a single use of the Taser in drive-stun mode to quell a nonviolent, mentally ill individual who was resisting arrest, did not violate the Fourth Amendment. Even if such a conclusion was constitutionally mistaken — as a jury could find on the facts of this case — Cummings is shielded by qualified immunity.")

Cugini v. City of New York, 941 F.3d 604, 615 (2d Cir. 2019), is particularly notable in light of the Eleventh Circuit's holding here, that this is a "close case" but denying qualified immunity nonetheless. (11a.). The Second Circuit held that a denial of qualified immunity would be appropriate *only* if the matter is not a close one, as follows:

> To determine whether a defendant officer is entitled to qualified immunity from a Fourth Amendment claim against him on a motion for summary judgment, we are to assess whether "under clearly established law, every reasonable officer would have concluded that [the defendant's] actions violated [the plaintiff's] Fourth Amendment rights in the particular circumstance presented by the uncontested facts and the facts presumed in [the plaintiff's] favor.... In other words, summary judgment for the defendant is required where the only conclusion a rational jury could reach is that reasonable officers would disagree about the legality of the [defendant's] conduct under the circumstances.") (citations and quotations omitted) (brackets in original).

Cugini, *supra*, 941 F.3d at 615.

For its part, the Fifth Circuit took a district court to task for doing precisely what the Eleventh Circuit did here: "[I]nstead of engaging in [the clearly established law] prong of the analysis, the district court merely announced the presence of factual disputes and recited the general contours of excessive force and due process

violations on its way to denying summary judgment. In other cases where this court has been presented with a similarly deficient record, we have not hesitated to reverse the denial of qualified immunity."). *Modacure v. Short*, No. 22-60546, 2023 WL 5133429, at *2 (5th Cir. Aug. 10, 2023).

And the Tenth Circuit (rightly) pointed out again this year the disjunctive nature of the two-prong qualified immunity analysis, to whit, that even if there are disputed facts from which a jury could find a constitutional violation, qualified immunity still exists if, as a matter of law, the violation under the circumstances was not sufficiently clearly established. *See Hodge v. Bartram*, No. 21-2125, 2023 WL 1462746, at *5 (10th Cir. Feb. 2, 2023) ("[I] n Hodge's view, that the… factors weigh in her favor establishes the obviousness of the constitutional violation: her suspected crimes were minor, she posed no immediate threat, and she neither resisted arrest nor attempted to flee. But even if the application of those factors could support the finding of a constitutional violation, they do not weigh so heavily in her favor as to render Bartram's conduct inarguabl[y] excessive…. This is not a case of an obvious constitutional violation, and Hodge has not identified on-point precedent that would have put every reasonable officer on notice that Bartram's conduct violated Hodge's Fourth Amendment rights. Because this absence of clearly established law entitles Bartram to qualified immunity, we reverse the district court's order denying him summary judgment.") (citations and quotations omitted).

In light of these developments in the Circuit courts, there are two broad implications of the Eleventh Circuit's error: the first and most obvious is that, in determining

that whether an officer acted "objectively reasonably" is itself a jury question (rather than a question of law that should be determined in light of the undisputed facts, with any remaining pertinent disputes resolved in the Respondents' favor), the Eleventh Circuit Panel ran afoul of *Scott* and its progeny.

Second, with more far-reaching impact, the Eleventh Circuit joins in the qualified immunity context a trend of punting such questions to the jury. And when the "clearly established law" is defined too broadly—discussed further below—this in effect creates a new analytical framework whereby (1) the general legal principle is announced, and (2) if the jury could find against the movant on some fact bound up in the violation inquiry (that is to say, on the merits), and in fact *does*, then *ipso facto* there would be a violation of clearly established law. This, in effect, destroys the two-prong qualified immunity analysis, and results in a legal world wherein—contrary to this Court's precedent—a factual dispute as to the underlying violation will *always* preclude summary judgment, regardless of how the undisputed facts (and those facts otherwise resolved in the nonmovant's favor) would comport with clearly-established law. In short: if the Eleventh Circuit (and its compatriots similarly and improperly casting issues as jury questions) are right, then on summary judgment the availability of qualified immunity turns simply on whether there are disputed facts on the merits—an inquiry redundant to the ultimate issue of liability on the merits in the first place. *See, e.g.*, *Otkins*, *supra*, 2023 WL 6518119, at *3.

This Court should grant certiorari to correct these errors, resolve the circuit split, and clearly reiterate that,

in the qualified immunity context on summary judgment, the correct analysis is as follows:

> (1) In determining whether a constitutional violation occurred, the court is to consider all undisputed facts. If it finds a constitutional violation did occur, *or* if it cannot determine the merits without reference to disputed facts…
>
> (2) The court should resolve all material issues of disputed facts in favor of the nonmovant; and then, even assuming *arguendo* that a violation occurred, evaluate whether existing precedent with sufficient factual similarity put the officer on notice that his actions, *under this set of facts*, violated clearly established law.

II. A Circuit Split Joined By The Eleventh Circuit Has Improperly Injected Subjective Elements Into The Objective Fourth Amendment And Qualified Immunity Analyses, And This Court Should Correct Same.

This Court has established that "warrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement. Therefore… the exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable in the same sense." *Kentucky v. King*, 563 U.S. 452, 462, 131 S. Ct. 1849, 1858, 179 L. Ed. 2d 865 (2011). Therefore, the test for determining whether an exigency existed so as to pose a legitimate exception to the Fourth Amendment's warrant requirement is an objective one. Curiously, the

Eleventh Circuit Panel's opinion correctly stated this rule: "We look to the totality of the circumstances to determine whether officers were justified in acting without first obtaining a warrant…. [T]he circumstances must be such that a reasonable officer could have objectively believed that an immediate search was necessary to safeguard potential victims." (16a., *citing Missouri v. McNeely*, 569 U.S. 141, 145 (2013), *United States v. Evans* 958 F.3d 1102, 1106 (11th Cir. 2020) (quotations omitted)).

But having identified the appropriate objective analysis, the Panel ultimately abandoned it. In determining whether exigent circumstances existed, it announced that "[i]f a jury determines that the deputies reasonably understood Harley's statements to reflect an intention to commit suicide by cop, and it further concludes that the deputies reasonably viewed those statements to reflect a state of mind that continued at about the time Sergeant Curran and Deputy Higdon crossed onto the curtilage, exigency was present." (26a.). In so doing, the Panel made the question of exigency turn on what the officers *in fact* believed *subjectively*, rather than on whether an objectively reasonable officer could have believed there was danger to life (whether Harley Turner's or the officers themselves).

The Panel fared no better on the qualified immunity analysis than it did abandoning the objective reasonableness standard on the merits. As this Court instructs, "[the qualified immunity analysis of *Harlow v. Fitzgerald*] purged qualified immunity doctrine of its subjective components(.)" *Mitchell v. Forsyth*, 472 U.S. 511, 517, 105 S. Ct. 2806, 2810, 86 L. Ed. 2d 411 (1985). "This inquiry [whether an officer violated a clearly established

Fourth Amendment Right] turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." *Pearson v. Callahan*, 555 U.S. 223, 243–44, 129 S. Ct. 808, 822, 172 L. Ed. 2d 565 (2009) (citation and quotations omitted). But here, the Panel held that "the fact that Sergeant Curran authorized Deputy Kerger to approach Harley unarmed in an effort to draw him to the fence line suggests that *he did not view* Harley as an imminent threat to law enforcement." (24a.) (emphasis supplied). Coupled with the discussion, *supra*, about what a jury could conclude about what the deputies in fact "reasonably believed," this analysis supplants the objective reasonableness standard for qualified immunity twice over: not only on the existence of an underlying constitutional violation (i.e., whether an objectively reasonable officer would have believed an exigency existed under the circumstances); but also on the "clearly established law" prong, i.e., whether an objectively reasonable officer would have known—based on factually instructive precedent—that his conduct would violate Harley Turner's rights in this instance.

As with the improper invocation of the jury, discussed above, the Eleventh Circuit here too is not alone, and is joined by a host of its sister circuits creating a circuit split. On one hand, there are those who, like the Eleventh Circuit Panel here, inject subjective considerations into their qualified immunity analyses:

In at least one instance, the First Circuit inserted subjectivity into the qualified immunity consideration by accounting for the apparent subjective purposes of the officers pursuing an interview at the door of a home. *See*

French v. Merrill, 15 F.4th 116, 132–33 (1st Cir. 2021), *cert. denied sub nom. Morse v. French*, 143 S. Ct. 301, 214 L. Ed. 2d 132 (2022) ("Far from engaging only in conduct that a homeowner might reasonably expect from a private citizen on their property -- that is, again, approaching the door, knocking promptly, and leaving if not greeted by an occupant -- the officers reentered the property four times and took aggressive actions until French came to the door *so that the officers could pursue their criminal investigation*. By so doing, the officers engaged in precisely the kind of warrantless and unlicensed physical intrusion on the property of another… clearly established as a Fourth Amendment violation. Hence, the officers violated clearly established law and are not entitled to qualified immunity." (emphasis supplied)

The Fifth Circuit went so far as to expressly state that the sine qua non of qualified immunity is for the officer to prove his subjective state of mind to be reasonable. *See Larpenter v. Vera*, No. 22-30572, 2023 WL 5554679, at *4–5 (5th Cir. Aug. 29, 2023) ("In order to establish his qualified immunity defense, Vera must show that he reasonably believed he had probable cause to seize Kevin.").

The Ninth Circuit denied qualified immunity not only on the basis of what an officer did not know and what his subjective concerns were; but also on the basis of what the plaintiff subjectively intended during an altercation with an officer. *See Briceno v. Williams*, No. 21-55624, 2022 WL 1599254, at *2 (9th Cir. May 20, 2022) ("Officer Williams did not know Briceno had a small keychain knife in his pocket. More importantly, the district court found a factual dispute over Williams's "purported concern" that

Briceno was "reaching for a weapon," because neither Williams nor any other officer ever searched Briceno for weapons and Briceno testified that he was only trying to protect his arms. We interpret those facts favorably to Briceno and conclude that a reasonable officer would not have perceived Briceno to be reaching for a weapon.") (quotations in original).

In contrast, other circuits—and some of the same—have been more faithful to the Fourth Amendment objective reasonableness standard, and confined themselves to what defendants could have *reasonably* thought in a debatable circumstance:

See, e.g., *Mlodzinski v. Lewis*, 648 F.3d 24, 35-36 (1st Cir. 2011) ("Defendants could have reasonably thought that officer safety concerns justified the use of the handcuffs to avoid any danger, however small, that the detained occupants would use the hidden nightstick or possibly a gun to harm them…. They are entitled to immunity because it would have been fairly debatable among reasonable officers whether detaining plaintiffs in handcuffs for forty-five minutes to an hour during the search was reasonable under the facts.").

In *Demuth v. Cnty. of Los Angeles*, 798 F.3d 837 (9th Cir. 2015), the Ninth Circuit determined that an objectively reasonable officer would have known an arrestee was being sarcastic; hence, having argued that somehow this statement authorized him to arrest her, that officer's qualified immunity was denied. 798 F.3d at 839 ("Li also relies on Demuth's statement that he would have to arrest her to bring her into court immediately. While challenging someone equipped with a badge, handcuffs

and a gun to 'arrest me' was unwise on Demuth's part, we fail to see what legal difference her statement makes. Demuth certainly could not authorize her own arrest and, in any event, Li could not reasonably have believed that Demuth was volunteering for handcuffs. Demuth was obviously employing a literary device known as sarcasm…. Her statement was a snide way of refusing; no reasonable officer could have thought otherwise. Having no reasonable basis for believing he was authorized to arrest Demuth, Li is not entitled to qualified immunity."

To its credit, the Third Circuit has put it succinctly: "The inquiry is an 'objective (albeit fact-specific) question,' under which '[an officer]'s subjective beliefs ... are irrelevant.'… Because the inquiry is from the perspective of a reasonable officer, we 'consider[ ] only the facts that were knowable to the defendant officer[ ].'" *James v. New Jersey State Police*, 957 F.3d 165, 169 (3d Cir. 2020), *citing Anderson*, 483 U.S. at, 641 (1987); *White v. Pauly*, 580 U.S. 73 (2017) (brackets in original).

The Fourth Circuit likewise: "[O]ur Court has consistently conducted an objective analysis of qualified immunity claims and stressed that an officer's subjective intent or beliefs play no role…. [W]e made clear that an officer's good intentions do not make objectively unreasonable acts constitutional. …We reiterated… that the qualified immunity determination is an objective one, dependent not on the subjective beliefs of the particular officer at the scene, but instead on what a hypothetical, reasonable officer would have thought in those circumstances.… And…, we held that [w]e may assume that [an officer] subjectively believed that the force he used was not excessive; that, however, is not

the question. The question is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Henry v. Purnell*, 652 F.3d 524, 535 (4th Cir. 2011) (citations and quotations omitted) (brackets in original).

Certiorari should be granted and this Court should clarify that neither the objective reasonableness standard for determining whether an exigency exception to the Fourth Amendment exists in a given situation, nor the qualified immunity analysis, properly turns on subjective considerations.

III. The Panel Improperly Defined "Clearly Established Law" At Too High A Level Of Generality

This is not the Eleventh Circuit's first error on this front in this case; this time, it elects to define "clearly established law" in an overly general way, merely restating an overarching legal principle, without any concrete analysis comparing the now-established undisputed material facts to any substantively instructive precedent.

The Panel described "clearly established law,"[1] for purposes of qualified immunity, in terms of a generally applicable principal of law, rather than by looking at the particularized facts of the conduct at bar in light of factually similar and instructive precedent. The Panel

1. Qualified immunity shields public officials so long as their conduct "does not violate clearly established statutory or constitutional rights" of which a reasonable person should have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727 (1982).

repeats its error from the first time this matter was appealed (from a ruling on motion to dismiss): it defines the pertinent parameters of "clearly established [Fourth Amendment] law as nothing more than the guarantees of the Fourth Amendment itself. The Panel stated: "[B]inding precedent clearly established… that a seizure or entry within the home [or on tis curtilage] without a warrant or exigent circumstances violates the Fourth Amendment(.)… [C]ircumstances do not qualify as exigent unless the police reasonably believe an emergency exists which calls for an immediate response to protect citizens from immediate danger." (28a.). This approach—the application of a general principle of law—is wrong.

This definition of "clearly established law" fails to adhere to this Court's instructions on the specificity that prong requires. *See, e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 528, 105 S.Ct. 2806 (1985) (at the summary judgment stage, the "clearly established law" prong hinges on "whether the law clearly proscribed *the actions the defendant claims he took*.") (emphasis supplied); *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987) ("[O]ur cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful…; but it is to say that in the light of pre-existing law t*he unlawfulness must be apparent*.") (emphasis supplied). In other words, there must be a case with sufficiently similar facts so as to provide fair notice; or there must be obvious clarity that the conduct

is unlawful. *See White v. Pauly*, 580 U.S. 73, 79, 137 S. Ct. 548, 552, 196 L. Ed. 2d 463 (2017).

Here, the Eleventh Circuit here failed to do what this Court in *White* said it must do: "It failed to identify a case where an officer acting under similar circumstances as [the Petitioners] was held to have violated the Fourth Amendment. Instead, the majority relied on [authorities] which—as noted above—lay out excessive-force principles at only a general level." *White*, 580 U.S. at 79. And the Eleventh Circuit certainly did not find that there was an *obvious* violation here. *See Id.* Notably, the Panel itself said this was a "close case." (11a.)

Post-*Harlow*, this Court has time-and-again reversed and criticized lower courts for doing precisely what the Eleventh Circuit Panel has done.

In *Mitchell v. Forsyth*, this Court articulated that the determination hinges upon "whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions" or (at the summary judgment stage) "whether the law clearly proscribed the actions the defendant claims he took." U.S. 511, 528, 105 S. Ct. 2806, 2816, 86 L. Ed. 2d 411 (1985).

Subsequently, in *Anderson v. Creighton*, this Court instructed:

> "The operation of this standard [of objective legal reasonableness in light of clearly established law] ... depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified. For

example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading. Such an approach, in sum, would destroy 'the balance that our cases strike between the interests in vindication of citizens› constitutional rights and in public officials› effective performance of their duties,' by making it impossible for officials 'reasonably [to] anticipate when their conduct may give rise to liability for damages.' … It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official

> action is protected by qualified immunity unless the very action in question has previously been held unlawful …; but it is to say that in the light of pre-existing law the unlawfulness must be apparent."

Anderson v. Creighton, 483 U.S. 635, 639–40, 107 S. Ct. 3034, 3038–39, 97 L. Ed. 2d 523 (1987) (citations omitted).

The Court has since repeatedly made this point, because the Circuit courts, like the Eleventh Circuit, keep making the same error. *See Wilson v. Layne*, 526 U.S. 603, 615, 119 S. Ct. 1692, 1700, 143 L. Ed. 2d 818 (1999) (affirming Fourth Circuit's reversal of District Court's denial of summary judgment on qualified immunity because, at the time of the underlying incident, no court had held that the conduct in question—namely, media presence during a police entry into a residence—violated the Fourth Amendment); *see also Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001), *receded from on other grounds by Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808 (2009) (reversing denial of summary judgment on qualified immunity and noting that "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation that he confronted.") (emphasis supplied); *Brosseau v. Haugen*, 543 U.S. 194, 199-201, 125 S. Ct. 596, 599, 160 L. Ed. 2d 583 (2004) (reinstating grant of summary judgment on qualified immunity because Court of Appeals "was mistaken" in applying general tests to Fourth Amendment excessive force claims and holding that law was not clearly established because precedent invoked "undoubtedly show that this area [of acceptable

vs. excessive force] is one in which the result depends very much on the facts of each case" and "[n]one of them squarely governs the case here."); *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 2083, 179 L. Ed. 2d 1149 (2011) (reversing Ninth Circuit's affirmation of District Court's denial of motion to dismiss on qualified immunity grounds and holding that, in determining whether the underlying conduct violates clearly establish law, "[w]e do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate."); *Stanton v. Sims*, 571 U.S. 3, 7, 9, 134 S. Ct. 3, 5, 187 L. Ed. 2d 341 (2013) (admonishing Ninth Circuit for denial of officer's qualified immunity for entry into home in hot pursuit of suspect where precedent had not settled whether said situation violated the Constitution and where cases relied on were not factually similar because they did not involve hot pursuit); *White v. Pauly*, 137 S. Ct. 548, 552, 196 L. Ed. 2d 463 (2017) (Tenth Circuit "misunderstood the 'clearly established' analysis" because "[i]t failed to identify a case where an officer acting under similar circumstances (…) was held to have violated the Fourth Amendment.").[2]

2. In fact, this is the exact same error for which the Supreme Court reversed the Eighth Circuit in *Anderson v. Creighton*. *See* 483 U.S. at 640-41 (1987) ("[The Eighth Circuit's] brief discussion of qualified immunity consisted of little more than an assertion that a **general** right Anderson was alleged to have violated…It simply does not follow immediately from the conclusion that it was firmly established that warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment that Anderson's search was objectively legally unreasonable." (bold emphasis supplied).

The Panel went on to compound its error of over-generality into a jury question whereupon qualified immunity would be denied: "[I]f a jury finds that the deputies' actions… were not warranted by exigent circumstances, clearly established law supports the conclusion that Appellees violated Harley [Turner's] Fourth Amendment rights. And because Harley's rights were clearly established, the deputies are not entitled to qualified immunity on the Fourth Amendment claim at this juncture." (28a-29a.).

If ever a matter warranted the application of qualified immunity on the undisputed facts—and if ever a complex, dangerous, and rapidly developing situation was disserved by an over-general abstraction of "clearly established law"—it is this one. This Court should grant certiorari to stem the tide of confusion the Circuit courts have created despite this Court's repeated admonitions, whereby whether the scope and specificity of "clearly established law" is sufficient for purposes of qualified immunity appears to have become little more than a Rorschach test for the Panel that happens to be sitting in review. And the Eleventh Circuit Panel's decision, at the very least on this front, should be reversed.

CONCLUSION

Certiorari should be granted because this Court should reiterate and clarify that, in the qualified immunity context, the determination does not automatically go to a jury simply because some facts on the merits may be disputed; because this Petition presents important and undecided questions of law concerning whether subjective elements have improperly crept into the Fourth

Amendment jurisprudence on exigency, as well as in the qualified immunity analysis; and because this Petition presents the Court with the opportunity to proscribe for good the recurring notion among the Circuit courts that "clearly established law" can be defined as a general restatement of constitutional guarantees, contrary to this Court's clear and repeated precedent.

Respectfully submitted, this 12th day of October, 2023.

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED APRIL 11, 2023

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-10600

JANET TURNER O'KELLEY, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN HARLEY TURNER, JOHN ALLEN TURNER,

Plaintiffs-Appellants,

versus

SGT. TRAVIS PALMER CURRAN, A.K.A. TRAVIS LEE PALMER, DEP. FRANK GARY HOLLOWAY, DEP. KEELIE KERGER, DEP. BILL HIGDON, DEP. TODD MUSGRAVE,

Defendants-Appellees,

OFC. JONATHAN SALCEDO, *et al.*,

Defendants.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 2:17-cv-00215-RWS

Before ROSENBAUM and LAGOA, Circuit Judges, and WETHERELL,* District Judge.

* Honorable T. Kent Wetherell, II, United States District Judge, for the Northern District of Florida, sitting by designation.

Appendix A

PER CURIAM:

This case makes its second appearance before us. Plaintiffs-Appellants Janet Turner O'Kelley ("Janet") and her ex-husband, John Turner, appeal the district court's entry of summary judgment against them in their 42 U.S.C. § 1983 action relating to an alleged warrantless seizure of their son John Harley Turner ("Harley").[1] Defendants-Appellees Sergeant Travis Palmer Curran, Deputies Bill Higdon, Keelie Kerger, Frank Holloway, and Todd Musgrave, and various other officers [2] responded to a 911 call reporting that a drunk individual had threatened to shoot hunters for trespassing on land situated in Pickens County, Georgia. When the deputies arrived, they took up positions outside the fence line of Janet's property, on which various buildings were located, including Janet's son Harley's home. Harley walked out of his home with a handgun, and a thirty-minute standoff between the deputies and Harley ensued. Eventually, two deputies crossed the fence line to deploy beanbag shotgun rounds at Harley in an attempt to disarm him. When the beanbags struck Harley, he shot at police with his handgun. In response, various officers shot back at Harley, striking him and tragically causing his death.

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1. We refer to Harley by his middle name because that is how the district court and parties refer to him. We refer to the O'Kelleys (Janet and her husband Stan) by their first names to avoid confusion.

2. Although other law-enforcement officers responded to the call and were initially named as defendants, we affirmed the dismissal of the claims against the other officers in the prior appeal.

Appendix A

Harley's parents brought a wrongful-death suit, claiming unlawful seizure and excessive force, among other things. The lawsuit set forth both federal and state-law claims. The district court dismissed the case, and Harley's parents appealed. The first time this case came before us, a panel of this Court reversed in part and remanded the case for further proceedings. *See O'Kelley v. Craig*, 781 F. App'x 888 (11th Cir. 2019) ("*O'Kelley I* ").

On remand, and following discovery, the deputies moved for summary judgment, again relying on the defenses of qualified immunity on the federal claims and Georgia law official immunity on the state claims. On the fuller record, the district court granted summary judgment in favor of the deputies on both the federal and state-law claims.

Harley's parents now appeal the district court's grant of summary judgment in favor of the deputies. The appeal, though, involves only the issue of whether the deputies violated Harley's Fourth Amendment rights when they crossed the fence line and seized him. It does not concern the federal excessive-force claim Harley's parents initially alleged because they do not contest the use of beanbags against Harley, and they concede that once Harley shot at Sergeant Curran, the other deputies were justified in shooting back at him. Harley's parents contend that the district court improperly determined that the deputies were justified in crossing over onto the O'Kelley property to subdue their son. This appeal also involves the issue of whether the deputies were entitled to official immunity on the state-law claim.

The primary question we must address in this case is whether exigent circumstances existed when the officers entered the O'Kelley property to detain Harley. We conclude that a material question of fact on this point requires us to vacate the grant of qualified immunity and remand the case for trial. But we agree with the dismissal of the state-law claim and therefore affirm the district court's entry of judgment in favor of the deputies on it.

I.

On October 24, 2015, at around 8:30 p.m., Kevin Moss called 911 and reported that he and a group of individuals had been hunting when a person on the neighboring property yelled through the woods, accusing them of trespassing and threatening to shoot them. Moss believed the person was drunk and told the 911 operator, "This son of a bitch is crazy." He later specified that the man threatened to "shoot us, shoot our dogs, he was going to cut us up for Halloween." According to Moss, the man then became involved in a heated verbal argument with an older gentleman who Moss thought might have been his father or grandfather.

When Deputies Higdon, Kerger, and Holloway responded to the call, they met the hunters—two men with two kids—near the property. The hunters reiterated the threats that the man in the woods had made—that he was yelling at them, "threatening to shoot them and cut off their arms and legs and feed them to dogs." But they indicated they could not see whether the person was armed since it was dark outside.

Based on these statements, the deputies proceeded to the neighboring O'Kelley property. There, they were met by Stan O'Kelley (Janet's husband and Harley's stepfather), who came out of the house with his hands in the air. He told the officers that he owned the property, that the 911 call was about his stepson, and that Harley was armed. Stan further explained which structures he and his wife and Harley lived in, specifically noting that Harley lived in a building behind his and Janet's own house. He also told the deputies that Harley was "out of his ever-loving mind" and that he had two guns—a ".45 and an SKS."[3]

While they spoke to Stan, deputies noticed Harley approaching the other side of a closed gate in the lower driveway of the property. They saw that Harley was shirtless, had a spotlight in his left hand, and a handgun in his right hand. Harley was wearing a makeshift bandolier with the holster across his chest. The deputies did not see the SKS anywhere. When the deputies saw that Harley was holding a handgun, they raised their own guns, pointed them at Harley, and ordered him to put his hands up, drop the gun, and get on the ground. They said that they were police officers and wanted to talk.

Harley responded by telling the deputies they were trespassing. The deputies repeatedly yelled at Harley to put the gun down. When Harley did not, one officer told the others to "Get cover."

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3. An SKS is a semi-automatic rifle. See https://www.sportsmans.com/shooting-gear-gun-supplies/rifles/norincosks-type-56-blued-semi-automatic-rifle-762x39mm-used/p/1542592.

According to the deputies, Harley began beaming his spotlight on each of them and waving the gun around by pointing it wherever the light was shining. Harley made "sweeping passes" with the gun and the spotlight, aiming the spotlight and temporarily blinding the deputies as he did so. All the while, Harley asked nonsensical questions and repeatedly accused the police of trespassing and stealing his property from him. Harley also told the deputies to leave, walked away from them, cursed at them, and encouraged them at various times to "shoot [him] in the back" and "open fire."

At some point, Harley holstered his gun across his chest. While this was going on, Stan repeatedly interjected, yelling at Harley, even though the deputies asked him to stand back or go inside. Stan's actions forced the deputies to move him from the area more than once, until the deputies finally convinced Stan to wait at the neighbor's house for the remainder of the encounter. Based on Harley's behavior and refusal to surrender his gun, the deputies took cover behind trees and bushes on the sides of the driveway and they called for backup. Deputy Holloway specifically requested that back-up bring less-than-lethal weapons support.

After several minutes of back and forth with the deputies, Harley turned and headed from the lower driveway to the upper driveway of the property, where Deputies Higdon and Kerger followed without crossing the fence line. Deputy Holloway remained at the lower driveway for the duration of the encounter.

At the upper driveway, Harley began pacing back and forth in the yard behind the fence, coming in and out of the deputies' sight. His gun was holstered at this point. When Harley approached the fence line, he again repeatedly aimed his spotlight into the deputies' eyes, making it difficult for them to see. But Harley never directly threatened the deputies, either verbally or with his handgun, and there is no evidence that Harley's gun ever left his holster at the upper driveway.

Meanwhile, Harley's mother Janet arrived at the property and attempted to speak with Harley. But the deputies escorted her further down the driveway to her truck, telling her to stay back "in case he starts shooting." After this, Harley disappeared behind the house.

Additional law-enforcement officers arrived on the scene, including Georgia State Patrol Officers, who took up sniper positions with their rifles, and Appellees Sergeant Curran and Deputy Musgrave, who joined the other deputies.

Sergeant Curran was certified in the use of bean-bag rounds—a less-than-lethal option for apprehending suspects. When he arrived, Sergeant Curran saw Harley at the fence with a gun in a "bandolier type thing" on his bare chest and a spotlight, and Stan standing on the porch. Various deputies instructed Harley to talk to them and repeatedly directed him to put his firearm down. But Harley was unwilling to do so and continuously accused the deputies of trespassing and stealing. He also repeatedly told law enforcement that he was tired and wanted to go to bed.

Given the circumstances and Harley's refusal to comply with their demands to give up his gun, the deputies formed a plan to use non-lethal force on Harley. Sergeant Curran believed the deployment of the less-than-lethal beanbags would not be effective from where he was situated, so he would have to get closer and cross the fence line. He told deputies Higdon and Kerger that he was going to look for a good place to deploy the beanbags. Towards that end, Sergeant Curran and Deputy Higdon went past a privet hedge on the side of the O'Kelleys' house and jumped over the fence, taking positions in a narrow alleyway between the house and the fence. The two deputies moved from the alleyway around the back of the house and into the O'Kelleys' backyard but retreated to the alleyway when their movement activated a floodlight.

Sergeant Curran instructed the other deputies to draw Harley to the fence so he could shoot Harley in the right shoulder with a beanbag. He thought this would knock Harley down or back him up and stun his right arm—which was the hand he had held the gun with earlier in the encounter. The intent was to prevent Harley from drawing his gun from his holster while Sergeant Curran disarmed him. Deputy Higdon was to provide cover for Sergeant Curran as this occurred.

While Sergeant Curran and Deputy Higdon got into position, Deputy Kerger believed she might be able to talk Harley into putting his gun down. She had gotten permission from Sergeant Curran to engage Harley in this way before Sergeant Curran crossed the fence line. Harley was in the driveway at the time, so Deputy Kerger

tried to draw him to the fence line—an area where the officers could see him (due to lighting) and where Sergeant Curran could get a good shot at him with the non-lethal beanbags.

Deputy Kerger stepped into the open driveway, raised her hands, and approached the fence to see if she could speak with Harley. Deputy Kerger told Harley that she did not have her gun and asked him to put his own gun down on the ground. Harley approached the fence with his gun holstered. He was still carrying his spotlight in one hand and he had a jug of water, which he had retrieved from his house, in the other. Despite commands to do so, Harley continued to refuse to place his holstered gun on the ground. Again, Harley repeatedly told the deputies that he wanted to end the encounter and that he was tired and wanted to go to bed.

As Harley moved closer to the fence towards Deputy Kerger, he abruptly turned to his right, moved, and saw Sergeant Curran. Harley's hands were down at his side. Harley lifted his arm and shined his spotlight into Sergeant Curran's eyes, temporarily blinding him. At this point, Sergeant Curran fired three beanbag rounds at Harley, striking him, but not knocking him down as intended. Harley drew his gun and fired at Sergeant Curran two times, hitting him in the elbow. In response, several officers shot back at Harley, killing him.

Thereafter, Harley's parents filed suit. The deputies moved to dismiss, and the district court granted the motion. On appeal, we vacated the dismissal order, in

part. The parties returned to the district court, where they engaged in discovery. Then the deputies moved for summary judgment, arguing that they were entitled to qualified immunity on the federal claim and official immunity on the state-law claim. Appellants filed a cross-motion for summary judgment contending that the deputies unlawfully entered the curtilage of the property without a warrant. The district court agreed with the deputies and entered judgment in their favor. Harley's parents now appeal.

II.

We review de novo a grant of summary judgment based on qualified immunity and state-agent immunity. *Hill v. Cundiff*, 797 F.3d 948, 967 (11th Cir. 2015). "When considering a motion for summary judgment, including one asserting qualified immunity, 'courts must construe the facts and draw all inferences in the light most favorable to the nonmoving party and when conflicts arise between the facts evidenced by the parties, [they must] credit the nonmoving party's version.'" *Feliciano v. City of Miami Beach*, 707 F.3d 1244, 1252 (11th Cir. 2013) (quoting *Davis v. Williams*, 451 F.3d 759, 763 (11th Cir. 2006)). Summary judgment is appropriate only when the evidence shows that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *McCullough v. Antolini*, 559 F.3d 1201, 1204 (11th Cir. 2009) (quotation marks omitted).

III.

At the outset, we note that, at the time the district court granted summary judgment, only Sergeant Curran, Deputy Higdon, and Deputy Kerger were implicated by the remaining claims. It is undisputed that Deputies Holloway and Musgrave were not directly involved in either the plan to cross the O'Kelleys' fence line or the plan to deploy less-than-lethal beanbags against Harley. Thus, irrespective of the parties' other arguments, the trial court's grant of summary judgment is due to be affirmed to the extent that it eliminated Deputies Holloway and Musgrave from the case.

IV.

The federal claim here requires us to consider whether the deputies should have attempted to obtain a warrant while Harley behaved as he did or whether deputies were justified in jumping the fence and attempting to disarm Harley because they thought he presented an imminent threat to himself or others. This is a close case, but we conclude that a reasonable jury could find that, when the deputies entered the O'Kelley property to seize Harley,[4] they were not faced with exigent circumstances that justified their entry onto the O'Kelleys' curtilage. We therefore vacate the district court's entry of summary judgment for the deputies on qualified-immunity grounds on the § 1983 claim.

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4. It is undisputed that shooting Harley with the beanbag rounds was a "seizure" for Fourth Amendment purposes. *See Vaughan v. Cox*, 343 F.3d 1323, 1328-29 (11th Cir. 2003).

We divide our discussion into five substantive sections. Section A discusses the governing principles of qualified immunity. In Section B, we review Fourth Amendment law. In Section C, we consider whether the property the deputies entered qualified as "curtilage" for Fourth Amendment purposes. In Section D, we apply the law to determine whether the deputies were entitled to qualified immunity. And in Section E, we discuss whether any Fourth Amendment right that was violated here was clearly established.

A.

Qualified immunity protects police officers from being sued in their individual capacities for discretionary actions performed in the course of their duties. *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). This protection shields them from suit as long as their conduct does not violate a clearly established constitutional right of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). This immunity balances the need for official accountability with the need to permit officials to engage in their discretionary duties without fear of personal liability or harassing litigation. *Pearson*, 555 U.S. at 231; *Durruthy v. Pastor*, 351 F.3d 1080, 1087 (11th Cir. 2003).

Officers who assert entitlement to qualified immunity must first establish that they were acting within the scope of their discretionary authority. *See Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002). No dispute exists

here that the deputies were acting within the scope of their discretionary authority when they crossed over the fence line and engaged Harley.

Because the parties agree that the deputies were acting within the scope of their discretionary authority, the burden shifts to the plaintiffs to establish that qualified immunity is inappropriate. *Penley ex. rel. Estate of Penley v. Eslinger*, 605 F.3d 843, 849 (11th Cir. 2010) (citing *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002)). First, the plaintiffs must establish that the officers' conduct violated a constitutionally protected right. Second, the plaintiffs must show that the right was clearly established at the time of the misconduct. *Pearson*, 555 U.S. at 232; *Grider v. City of Auburn*, 618 F.3d 1240, 1254 (11th Cir. 2010). The plaintiffs must make both showings to avoid qualified immunity.

Qualified immunity is an objective test, asking "whether a reasonable official could have believed his or her actions were lawful in light of clearly established law and the information possessed by the official at the time the conduct occurred." *Stewart v. Baldwin Cnty. Bd. of Educ.*, 908 F.2d 1499, 1503 (11th Cir. 1990). Accordingly, the facts of the case, and the reasonable inferences that can be drawn therefrom, are crucial to determining an officer's entitlement to qualified immunity. At summary judgment, a court must resolve any dispute in the facts material to the alleged Fourth Amendment violation in favor of the non-movant (Harley's parents), such that "the court has the plaintiff's best case before it." *Wate v. Kubler*, 839 F.3d 1012, 1019 (11th Cir. 2016) (quoting

Penley, 605 F.3d at 848). Then, "[o]nce we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party to the extent supportable by the record, the reasonableness of the officer's actions is a pure question of law." *Id.* (cleaned up).

B.

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated." U.S. Const. amend. IV. The Supreme Court has interpreted this text to generally require law-enforcement officers to secure a search warrant before entering or searching within a home. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006). That is so because, at the Fourth Amendment's very core is the right of an individual "to retreat into his [or her] own home and there be free from unreasonable governmental intrusion." *Florida v. Jardines*, 569 U.S. 1, 6, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013) (citation and internal quotation marks omitted). The same protection extends to "the area immediately surrounding and associated with the home"—what courts refer to as the "curtilage"—which is regarded "as part of the home itself for Fourth Amendment purposes." *Id.* (citation and internal quotation marks omitted).

Warrantless searches and seizures inside a home or its curtilage are presumptively unreasonable. *United States v. Walker*, 799 F.3d 1361, 1363 (11th Cir. 2015) (per curiam);

Brigham City, 547 U.S. at 403; *Bashir v. Rockdale Cnty., Ga.*, 445 F.3d 1323, 1327 (11th Cir. 2006). Still, the warrant requirement is not absolute and is subject to certain exceptions. One exception occurs when the "exigencies of the situation" obviate the need to obtain a warrant. *Brigham City*, 547 U.S. at 403-04; *Mincey v. Arizona*, 437 U.S. 385, 393-94, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978). In the absence of consent or exigent circumstances plus probable cause, a warrantless entry into a home (or its curtilage) by police violates a person's Fourth Amendment rights. *Bashir*, 445 F.3d at 1328; *see also United States v. Holloway*, 290 F.3d 1331, 1337 (11th Cir. 2002).

The exigent-circumstances exception recognizes that a "warrantless entry by criminal law enforcement officials may be legal when there is a compelling need for official action and no time to secure a warrant." *Bashir*, 445 F.3d at 1328 (citations omitted); *Feliciano*, 707 F.3d at 1251 ("Exigent circumstances . . . arise when the inevitable delay incident to obtaining a warrant must give way to an urgent need for immediate action.") (quotation marks omitted).

We have found exigent circumstances to exist in various situations, but the "most urgent" of these exigencies is the need to protect or preserve life. *United States v. Timmann*, 741 F.3d 1170, 1178 (11th Cir. 2013). Indeed, we have said that "[i]t is difficult to imagine a scenario in which immediate police action is more justified than when a human life hangs in the balance." *Holloway*, 290 F.3d at 1337.

Typically, for the exigent-circumstances exception to apply, the government must show both exigency and probable cause. *Id.* But the probable-cause element may be satisfied where officers reasonably believe a person is in danger. *Id.* at 1338. Courts have found exigency to exist when "the indicia of an urgent, ongoing emergency, in which officers have received emergency reports of an ongoing disturbance, arrived to find a chaotic scene, and observed violent behavior, or at least evidence of violent behavior" are present. *Timmann*, 741 F.3d at 1179 (collecting cases).

We look to the "totality of the circumstances" to determine whether officers were justified in acting without first obtaining a warrant. *Missouri v. McNeely*, 569 U.S. 141, 145, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013). Put another way, we "evaluate each case of alleged exigency based on its own facts and circumstances." *Id.* at 150 (citation and quotation marks omitted). As the Supreme Court has explained, "[w]hether a 'now or never situation' actually exists—whether an officer has 'no time to secure a warrant'—depends upon the facts on the ground." *Lange v. California*, 141 S. Ct. 2011, 2018, 210 L. Ed. 2d 486 (2021). Police do not "need ironclad proof of a likely serious, life-threatening injury to invoke" the exigent-circumstances exception, but the circumstances must be such that a reasonable officer "could have objectively believed that an immediate search was necessary to safeguard potential victims." *United States v. Evans*, 958 F.3d 1102, 1106 (11th Cir. 2020) (quoting *Michigan v. Fisher*, 558 U.S. 45, 49, 130 S. Ct. 546, 175 L. Ed. 2d 410 (2009)).

We engage in a two-part analysis to determine whether exigent circumstances existed. *See Ornelas v. United States*, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996). At the first step, we identify the historical facts that led to the trespass onto curtilage without a warrant. *See id.* at 1661-62. And at the second step, we review de novo whether a reasonable officer would believe these historical facts created exigent circumstances justifying entry without a warrant. *See id.* at 1661-62. Here, we do not get past the first step because the evidence reveals a genuine issue of fact as to the urgency of the situation at the time the deputies crossed onto the O'Kelleys' property.

C.

Because Harley's Fourth Amendment rights could be violated here only if the deputies entered his home or its curtilage, we address the curtilage issue first. The parties raise a number of opposing arguments regarding whether the area of the O'Kelley property where the deputies crossed constituted the curtilage of Harley's home. The district court did not reach this issue, but none of the facts relevant to the curtilage issue are in dispute, and the record is sufficiently developed for us to make the determination in the first instance.

After consideration, we conclude that the area in question constituted the curtilage of Harley's home even though the property was owned by Janet and Stan O'Kelly and the area upon which the deputies stood when they crossed the fence line was just outside the O'Kelleys' home, not Harley's.

The Supreme Court has established a test that includes four factors to determine if a particular area of the property of a home is curtilage: "[1] the proximity of the area claimed to be curtilage to the home, [2] whether the area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the resident to protect the area from observation by people passing by." *United States v. Dunn*, 480 U.S. 294, 301, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987). Still, though, these factors are merely "tools" to help courts determine the curtilage issue and are not dispositive. *Id.*

Here, on the first factor, the area where Sergeant Curran and Deputy Higdon crossed onto the property was situated close to the O'Kelley home, such that when they crossed the fence line, they were in a narrow space between the O'Kelleys' home and the fence—a space immediately adjacent to the O'Kelleys' kitchen. The space in which the deputies maneuvered was approximately two-feet wide, so they likely touched the house or came within inches of it.

As to the second factor, the area traversed by the deputies was included in the home's enclosure, as the fence ran the length of the property line, which included the O'Kelleys' house and Harley's house.

On the third factor, the areas where Sergeant Curran and Deputy Higdon walked to deploy the beanbags were used for family purposes. Although the alleyway between the O'Kelley house and the fence was too narrow to serve

as a passageway, it was used to store and protect items like sawhorses, ladders, and trash cans, and it featured windows into the kitchen where the O'Kelleys—including Harley—prepared their meals. *See Jardines*, 569 U.S. at 6 ("The [Fourth Amendment] right to retreat [into one's home] would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window").

Additionally, the deputies moved into the O'Kelley backyard at one point, which contained a garden. The record shows that Harley himself was an avid gardener, and "[g]ardening is an activity often associated with the curtilage of a home." *See United States v. Cousins*, 455 F.3d 1116, 1122-23 (10th Cir. 2006) (citing *United States v. Breza*, 308 F.3d 430, 436 (4th Cir. 2002)); *accord United States v. Jenkins*, 124 F.3d 768, 773 (6th Cir. 1997).

Finally, as to the fourth factor, the area was shielded from public observation because it was screened by a triangular wood line and the O'Kelley home. A privet hedge higher than a person's head was also present to shield the side where the neighbors' trailer was situated. All of the factors set forth in *Dunn* are therefore met.

While Harley lived in a different structure than the O'Kelleys, his house was located on the same property, close to their home. Curtilage is not limited to one particular building. Rather, it is instead "formed by the buildings constituting an integral part of that group of structures making up the [] home, . . . or the immediate domestic establishment of the home." *United States v.*

Berrong, 712 F.2d 1370, 1374 (11th Cir. 1983) (internal quotation marks and citations omitted); *see also Fixel v. Wainwright*, 492 F.2d 480, 483 (5th Cir. 1974)[5] (finding that the backyard of a four-unit apartment building was curtilage); and *United States v. Maxi*, 886 F.3d 1318, 1327 (11th Cir. 2018) (in the context of a duplex).

The record here shows that Harley's home was part of the same immediate domestic establishment as the O'Kelleys' home, as discussed in *Berrong*. The two homes were enclosed by the same wooded area on two sides and the same fence and hedge on the side where the deputies crossed the property. Significantly, Harley was not a stranger renting his home. Rather, he was a member of the O'Kelley family, living at the same mailing address as Janet and Stan. Indeed, Harley lacked a kitchen in his home, so he frequently visited his mother and stepfather's home and prepared and ate his meals at the O'Kelleys' house. In short, he used the O'Kelleys' home as if it were an extension of his own. *See United States v. Noriega*, 676 F.3d 1252, 1262 (11th Cir. 2012) (explaining that the focus of the *Dunn* factors is "whether an individual reasonably may expect that the area in question should be treated as the home itself." (quoting *Dunn*, 480 U.S. at 300)).

Based on these facts, the area of the O'Kelley property where Sergeant Curran and Deputy Higdon crossed the fence line to deploy the beanbags fell within

5. The Eleventh Circuit has adopted as binding precedent all decisions issued by the former Fifth Circuit prior to October 1, 1981. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

the curtilage of Harley's home. The area was close to where Harley lived, he used the O'Kelley house for meals, and he had a reasonable expectation of privacy in that area. *See Berrong*, 712 F.2d at 1374. Because the area Sergeant Curran and Deputy Higdon treaded upon was the curtilage of Harley's home, the deputies necessarily violated Harley's Fourth Amendment rights by crossing over onto the property without a warrant unless they received consent to enter the property or probable cause and exigent circumstances were present.

D.

We now turn to the question of whether exigent circumstances justified the deputies' breaching of Harley's curtilage. Though the deputies argue that they are entitled to qualified immunity on the Fourth Amendment claim, they rely somewhat on material facts that Harley's parents dispute. Taking the facts in the light most favorable to Harley's parents, as we must, we cannot find as a matter of law that an "urgent need for immediate action" existed when the deputies crossed the fence line. Rather, viewing the facts in Harley's parents' favor, we conclude that a jury could find that an objectively reasonable police officer faced with the same circumstances would not have believed that exigent circumstances existed at the time Sergeant Curran and Deputy Higdon crossed the fence line. We therefore leave it to a jury to make the determination of exigency after hearing all the evidence at trial.

The deputies direct us to various facts to persuade us that exigency excused them from obtaining a warrant

before seizing Harley. First, they note, law enforcement responded to a scene where Harley had just threatened to kill the hunters. And when one of the hunters—Kevin Moss—called 911, he informed the dispatcher that the person who threatened him was "crazy" and "drunk." Moss also indicated that the perpetrator was later engaged in a heated argument with his father or grandfather. Plus, when deputies met with Stan, he told them that Harley was the perpetrator and he was armed with two guns—a handgun and a semi-automatic assault rifle. Stan also voiced his opinion that Harley was "out of his ever-loving mind."

Not only that, but the deputies also emphasize, when deputies arrived at the O'Kelley property, they saw for themselves that Harley drew his gun and pointed it at them.[6] It was very dark, and Harley appeared shirtless, agitated, and holding a spotlight. He used the spotlight to blind the officers as he simultaneously waved his gun. And when deputies repeatedly commanded Harley to put his gun down, he refused and instead kept yelling and cursing at the officers, sometimes incoherently. Indeed, Harley repeatedly accused the deputies of stealing from him and poaching his deer. Along with these unusual statements, Harley paced back and forth, into and out of darkness.

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6. There is a factual dispute as to whether Harley pointed his gun "at" the officers or only in their general direction in the lower driveway, but that dispute is immaterial. What matters is the undisputed fact that Harley's gun was holstered in the upper driveway—the point at which the deputies actually crossed the fence line.

Further, at various times, Harley told the deputies to "shoot me in the back," and at other times he told them to "open fire." And besides all this, the deputies continue, during the encounter, other people were present—the O'Kelleys and two neighbors who were on their porch. Stan reportedly interjected himself into the situation at times.

Despite the deputies' reliance on this narrative, we cannot affirm the district court's qualified-immunity ruling. To be sure, most of these facts the deputies rely upon are not disputed. But some are. Plus, some of the facts on which the deputies rely occurred earlier in the encounter at the lower driveway. And by the time Sergeant Curran and Deputy Higdon crossed the fence line to the O'Kelley property, it is possible that any exigency arguably created by the events at the lower driveway had dissipated.[7]

For starters, by the time Sergeant Curran and Deputy Higdon crossed on to the O'Kelleys' curtilage, no civilians remained in harm's way. Although Harley had threatened

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7. Exceptions to the warrant requirement are "justified by and limited to the exigent circumstances of the moment" and "cannot be put in the bank and saved for use on a rainy day, long after any claimed exigency has passed." *United States v. Valerio*, 718 F.3d 1321, 1325 (11th Cir. 2013); *accord Roberts v. Spielman*, 643 F.3d 899, 905 (11th Cir. 2011) ("[An] officer's warrantless search must be strictly circumscribed by the exigencies which justify its initiation" (cleaned up)). Accordingly, as the Sixth Circuit has succinctly stated, "[t]ime is an essential factor when an *immediate* threat forms the basis for police claims of exigency . . . . [E]xigent circumstances terminate when the factors creating the exigency are negated." *Carlson v. Fewins*, 801 F.3d 668, 674 (6th Cir. 2015) (cleaned up).

to shoot the hunters, when law enforcement arrived, the hunters were already a safe distance away from the property. As for Stan's involvement, that likewise ended before the deputies crossed over onto the curtilage of the O'Kelley property. And Janet and the neighbors were also away from the area and not in direct danger.

Second, during the latter part of the encounter with law enforcement in the upper driveway, Harley repeatedly told the deputies that he was tired and just wanted to go to sleep. He did not threaten the deputies verbally and simply wanted to end the encounter without violence.

Third, although Harley held a gun in his hand during the initial part of the encounter with the deputies on the lower driveway, he had holstered his weapon when he reached the upper driveway. And Harley's gun remained holstered during the entire latter part of the encounter leading up to the deputies' crossing of the fence line.

Fourth, the fact that Sergeant Curran authorized Deputy Kerger to approach Harley unarmed in an effort to draw him to the fence line suggests that he did not view Harley as an imminent threat to law enforcement.

Taking all these facts as true and in the light most favorable to Harley's parents, a reasonable jury could find that the once-tense situation had de-escalated to the point that no exigency existed at the time Sergeant Curran and Deputy Higdon crossed over onto the property to seize Harley. That is not to say that the deputies should have left the O'Kelleys alone at the property with an agitated

Harley, but there is no evidence that the O'Kelleys would have faced imminent harm if the deputies took the time to obtain a warrant before crossing the fence line.[8]

It is undisputed that at no time did Harley threaten to shoot the officers, himself, or anyone else during the thirty-minute encounter with the deputies. And more importantly, Harley's gun remained holstered for the entire encounter at the upper driveway.[9]

But Harley's multiple remarks to the deputies to shoot him raise a genuine issue of material fact. On the one hand, the deputies argue that the eleven times Harley implored them to shoot him constituted unstable, suicidal utterances—statements by someone who wished to commit suicide by cop.[10] And in *Smith v. LePage*, we noted that a "clear-cut" justification for entry into a home (or its curtilage) without a warrant is an emergency involving

8. Sergeant Curran testified that, had they tried, it would have taken 45 minutes to an hour to obtain a warrant. It is unclear if someone would have needed to physically leave to obtain a warrant (Deputy Musgrave suggested that in "an emergency" they could "[c]all detectives" and obtain a warrant "fairly quickly"), but even if *someone* had to leave, there were seven law-enforcement officers on the scene at the time.

9. Other testimony confirms that, at the time the deputies crossed the fence line to subdue Harley, his gun was holstered and both of his hands were occupied—with a jug of water in one and a spotlight in the other.

10. "Suicide-by-cop" is a colloquial term for the act of intentionally provoking police to kill oneself. *See N. Am. Co. for Life & Health Ins. v. Caldwell*, 55 F.4th 867, 869 (11th Cir. 2022).

a "need to protect or preserve life." 834 F.3d 1285, 1292-93 (11th Cir. 2016) (citation and internal quotation marks omitted). There, we also clarified that "[t]his can include the lives of people threatened by a suspect, or the suspect's life if he is suicidal." *Id.* at 1293 (citation omitted).

Yet on the other hand, Harley's parents point to the record as a whole to contend Harley's statements indicated that he was simply frustrated and wanted to be left alone, and no reasonable officer would have thought him to be suicidal.

If a jury determines that the deputies reasonably understood Harley's statements to reflect an intention to commit suicide by cop, and it further concludes that the deputies reasonably viewed those statements to reflect a state of mind that continued at about the time Sergeant Curran and Deputy Higdon crossed onto the curtilage, exigency was present. That is so because their actions would be in furtherance of disarming an individual considered to be a danger to himself. But on the other hand, if a jury finds that no deputy reasonably could have understood Harley's statements to indicate that he was suicidal when Sergeant Curran and Deputy Higdon crossed onto the curtilage, exigent circumstances did not exist. A jury should decide this key issue. *See Caldwell*, 55 F.4th at 871; *Hardigree v. Lofton*, 992 F.3d 1216, 1229 (11th Cir. 2021) (citing *McClish v. Nugent*, 483 F.3d 1231, 1240-41 (11th Cir. 2007)).

In sum, assuming Harley's parents' version of the facts to be true—one in which Harley did not act in a manner

evincing suicidal intentions, had holstered his gun for the entirety of the exchange with law enforcement in the upper driveway, had repeatedly expressed a desire to end the standoff and go to bed, and where Sergeant Curran allowed Deputy Kerger to engage Harley without her gun drawn—a reasonable officer would not believe that Harley presented an immediate threat to himself or others requiring urgent action to seize Harley. *See Hardigree*, 992 F.3d at 1229. But under the deputies' version of the facts—where Harley was reasonably perceived as an unstable individual who wished to commit suicide by cop—a jury could conclude that a reasonable officer would have believed that Harley presented an immediate threat to himself or others and thus, exigent circumstances justified entry onto the O'Kelleys' property.

For all these reasons, we conclude that genuine issues of material fact exist as to whether exigent circumstances justified the deputies' entry onto the O'Kelley property.

E.

USCA11 Case: 22-10600 Document: 42-1 Date Filed: 04/11/2023 Page: 28 of 33 22-10600 Opinion of the Court 29 That brings us to the second part of the qualified-immunity analysis: whether the alleged constitutional violation was clearly established. Indeed, even if the deputies violated Harley's Fourth Amendment rights by entering the curtilage without justification, they would still be entitled to qualified immunity unless the law was clearly established that their actions violated Harley's constitutional rights.

As we explained when this matter was before us on the initial appeal,

> [B]inding precedent clearly established, at the time of the encounter on October 24, 2015, that a seizure or entry within the home [or on its curtilage] without a warrant or exigent circumstances violates the Fourth Amendment's prohibition on unreasonable searches and seizures. And the parameters of the exigent-circumstances doctrine were well-established before then, including, as relevant here, that circumstances do not qualify as exigent unless "the police reasonably believe an emergency exists which calls for an immediate response to protect citizens from imminent danger.

See O'Kelley I, 781 F. App'x at 898 (quoting *Holloway*, 290 F.3d at 1337).

So if a jury finds that the deputies' actions in crossing over the fence line onto the O'Kelleys' property to disarm Harley were not warranted by exigent circumstances, clearly established law supports the conclusion that Appellees violated Harley's Fourth Amendment rights. And because Harley's rights were clearly established, the deputies are not entitled to qualified immunity on the Fourth Amendment claim at this juncture. For these reasons, we find that the district court erred in entering summary judgment in favor of Sergeant Curran and Deputies Higdon and Kerger.

Ultimately, we conclude that genuine issues of material fact exist as to whether the deputies were entitled to judgment as a matter of law. We therefore remand this case to the district court for a trial on the issue of whether exigent circumstances justified the deputies' entry onto the O'Kelley property without a warrant. Put another way, a jury should determine whether reasonable officers would construe the situation as involving exigent circumstances—one involving an urgent need for immediate action. *Feliciano*, 707 F.3d at 1251.

V.

Finally, we turn to Harley's parents' state-law claim. Harley's parents set forth cursory arguments in their initial brief as to why the district court's decision with respect to the state-law claim was erroneous. We are not persuaded.

First, the Federal Rules of Appellate Procedure require that an appellant's brief contain "a statement of the issues presented for review." Fed. R. App. P. 28(a)(5). We have held that any issues not raised in the "Statement of Issues" are generally deemed to be waived. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680 (11th Cir. 2014). Harley's parents did not present their official-immunity and state-law claim in their Statement of Issues—rather, they presented only the curtilage and qualified-immunity issues. Arguably, any issues relating to the state-law claim have been waived.

But even if the issues were not waived, they fail on the merits. On this record, no evidence exists that the deputies acted with malice or an intent to injure Harley. And in Georgia, "county law-enforcement officers . . . generally enjoy official immunity from suits alleging personal liability in tort for performance of official functions." *Bailey v. Wheeler*, 843 F.3d 473, 485 (11th Cir. 2016). As a result, state officials may not be held liable for injuries caused through their performance of discretionary functions unless they act "with actual malice or with actual intent to cause injury." *Id.* (citing Ga. Const. art. I, § 2, para. IX(d) and *Brown v. Penland Constr. Co, Inc.*, 281 Ga. 625, 641 S.E.2d 522, 523 (2007)).

"'[A]ctual malice' requires a deliberate intention to do wrong." *Id.* (quoting *Merrow v. Hawkins*, 266 Ga. 390, 467 S.E.2d 336, 337 (1996)). And "actual intent to cause injury" requires an "actual intent to cause harm to the plaintiff, not merely an intent to do the act purportedly resulting in the claimed injury." *Kidd v. Coates*, 271 Ga. 33, 518 S.E.2d 124, 125 (1999) (quoting *Frame v. Boatmen's Bank*, 782 S.W.2d 117, 121 (Mo.App.1989)).

Here, nothing in the record supports the conclusion that the deputies acted with actual malice or an intent to injure when they crossed the property line to engage Harley with less-than-lethal force. The testimony of each of the deputies shows that, while they intended to hit Harley with the beanbags, their objective in doing so was to de-escalate the situation by disarming Harley. And Sergeant Curran's testimony reflects that he employed the beanbags because he did not want to seriously injure

Harley. Even if the plan was ill-conceived or poorly executed, mere recklessness is insufficient to overcome official immunity in Georgia. *Hanse v. Phillips*, 276 Ga. App. 558, 623 S.E.2d 746, 750 (Ga. Ct. App. 2005). Because nothing in the record supports a finding that the entry onto the curtilage was malicious or meant to injure Harley, the district court correctly granted the deputies official immunity from the state-law claim. We affirm the dismissal of the state-law claim.[11]

VI.

For the foregoing reasons, we reverse the district court's decision to deny on mootness grounds Harley's parents' motion for summary judgment on the curtilage issue. We vacate the district court's grant of summary judgment in favor of Sergeant Curran and Deputies Higdon and Kerger on the Fourth Amendment claim and remand that claim for trial. We affirm the district court's grant of official immunity on the state-law claim

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11. Harley's parents, citing our prior opinion, argue that the deputies are not entitled to state-law official immunity because the use of the beanbag rounds was not justified by self-defense. However, self-defense is not the standard for official immunity in Georgia—actual malice or intent to injure is. *Bailey*, 843 F.3d at 485. Although we noted in our prior opinion that the official immunity analysis "*often* comes down to whether the officer acted in self-defense," *O'Kelley I*, 781 F. App'x at 899 (emphasis added), "often" does not mean "always," and both this Court and the Georgia courts have granted official immunity in use-of-force cases not involving self-defense. *See Peterson v. Baker*, 504 F.3d 1331, 1339-40 (11th Cir. 2007) (per curiam); *Tittle v. Corso*, 256 Ga. App. 859, 569 S.E.2d 873, 877-78 (Ga. Ct. App. 2002).

and the grant of summary judgment in favor of Deputies Musgrave and Holloway

AFFIRMED IN PART; REVERSED IN PART; VACATED IN PART and REMANDED IN PART.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, GAINESVILLE DIVISION, FILED FEBRUARY 2, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

Civil Action No.
2:17-CV-215-RWS

JANET TURNER O'KELLEY, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN HARLEY TURNER, AND JOHN ALLEN TURNER,

Plaintiffs,

v.

SGT. TRAVIS PALMER CURRAN, A/K/A TRAVIS LEE PALMER; DEP. FRANK GARY HOLLOWAY; DEP. KEELIE KERGER; DEP. BILL HIGDON; AND DEP. TODD MUSGRAVE,

Defendants.

February 2, 2022, Decided;
February 2, 2022, Filed

Appendix B

ORDER

This case comes before the Court on Defendants Sergeant Travis Palmer Curran, a/k/a Travis Lee Palmer, Deputy Frank Gary Holloway, Deputy Keelie Kerger, Deputy Bill Higdon, and Deputy Todd Musgrave's Motion for Summary Judgment [Dkt. 113] and Plaintiffs Janet Turner O'Kelley, individually and as personal representative of the Estate of John Harley Turner, and John Allen Turner's Motion for Partial Summary Judgment [Dkt. 117]. After reviewing the parties' briefings, the Court enters the following Order.

BACKGROUND

I. Factual Background

This case stems from a deadly encounter between John Harley Turner ("Harley") and several law-enforcement officers on the night of October 24, 2015.

A. The Property

On October 24, 2015, Harley lived at 1607 Carver Mill Road with his mother and stepfather, Mr. and Mrs. O'Kelley. The property was in a wooded area and included several distinct structures. Mr. and Mrs. O'Kelley lived in the main house, which they called the "Barn," while Harley lived in a small cabin separate from and behind the main house that the family called the "Chalet." Between these two structures was a small structure containing the property's well pump and an attached carport, which they referred to as the "Pump House".

Appendix B

1607 Carver Mill Road is enclosed from the neighbors' property by a chain-link fence that runs east-west down the full length of the property line, on which "No Trespassing" signs are periodically posted. The clearing in which the Barn, Chalet, and Pump House is located is bordered to the south by the fence and to the east and west by thick woods. The woods on the eastern side of the property are sandwiched between the clearing and Carver Mill Road, and they block a person's view of the house from the road.

A driveway provides access to the property from Carver Mill Road. The driveway has a lower and upper portion. The lower portion is unlit and bordered by thick brush, and it splits off from the upper portion and runs through the woods, making it largely inaccessible by car. The upper portion, by contrast, provides vehicle access to the Barn, Chalet, and Pump House. Gates connected to the fence run across both the lower driveway and the upper driveway.

Finally, along the fence, west of the upper driveway, there is a privet hedge. At the time of the encounter underlying this case, the hedge was about 10-15 feet high. The hedge blocked people from being able to see into the Barn's kitchen windows and the small storage space that the O'Kelleys maintained beneath those windows.

B. The 911 Call and Interaction Between Harley and Officers

Around 8:30pm that night, a hunter called 911 to report that a resident on a neighboring property had accused him and some other hunters of trespassing on his land and threatened them with bodily harm if they did not leave. In particular, the hunter said the resident "threatened to shoot us, shoot our dogs, going to cut us up for Halloween." The hunter also stated that the resident was involved in a heated verbal argument with an older gentleman that might be his father or grandfather. The 911 operator reported the incident to law enforcement as a "completed domestic disturbance" or "a domestic that had already occurred." Pickens County Deputies Higdon, Holloway, and Kerger responded to the call. They met the hunters near the subject property at the intersection of Carver Mill Road and Dean Mill Road, where the hunters reiterated the threats that the resident made towards them but said they could not see whether that person was armed because it was dark.

The Deputies proceeded on to the subject property, arriving at 1607 Carver Mill Road at around 9:00pm. At that point, they met Mr. O'Kelley, who told them that he owned that property, that the 911 call was about his stepson Harley, and that Harley was armed. Mr. O'Kelley explained which structures he and his wife and Harley lived in, specifically noting that Harley lived in a building behind his own house. He also told the Deputies that Harley was crazy and "out of his ever-lovin' mind" and that he had two guns, "[a] .45 and an SKS." Mr. O'Kelley later

stated that Harley pointed his gun at him, though it is not clear whether he told the Deputies that this happened.

As the Deputies were speaking with Mr. O'Kelley, they saw Harley approaching the other side of a closed gate in the lower driveway, about 75 feet away from the officers. The Deputies saw that Harley held a spotlight in his left hand and a handgun in his right hand.[1] In addition, the Deputies saw that Harley was wearing a makeshift bandolier[2] with the holster for the handgun on it. The officers did not see the SKS anywhere on Harley's person, though they knew that Mr. O'Kelley said he had one. When the Deputies saw that Harley was holding a gun, they raised their own guns, pointed them at Harley, and loudly ordered him to put his hands up, drop the gun, and get on the ground. The Deputies identified themselves as law-enforcement officers. Mr. O'Kelley also told Harley to put the gun down and said that Harley had "caused all of this, damn it."

Harley did not put the gun down. Instead, the Deputies said that Harley began training his spotlight on each of the Deputies, sweeping the light back and forth,

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1. At the motion to dismiss stage, Plaintiffs alleged that Harley "was shirtless and armed with a pistol with a chest holster." [Dkt. 1 — Compl., at ¶ 29]. However, the since-developed facts reveal that Harley was actually holding the gun when he first approached the Deputies, a point Plaintiffs do not dispute. [Dkt. 148 — Pls.' Am. Opp., at 9].

2. A bandolier is a type of belt worn over the shoulder and across the chest that fits a shotgun and is often used for the holding of bullets, ammunition, or other weapons.

and waving his gun around and pointing it at wherever the light was shining.[3] He also repeatedly accused the Deputies of trespassing and stealing from him, told them to leave,[4] cursed at them, and explicitly encouraged the Deputies to "shoot [him] in the back" and "open fire." At some point during this encounter, Harley holstered his gun in a shoulder harness, although he took it out twice more. At the same time, Mr. O'Kelley repeatedly interjected by yelling at Harley, even though the Deputies had asked him to stand back on the porch or go inside, which he refused to do. The Deputies took cover behind various trees and bushes on the sides of the driveway and called for backup. Deputy Holloway specifically requested a SWAT team and asked for Sergeant Curran to come to the scene and bring less-lethal weapons.

After several minutes of this back-and-forth between Harley and the officers, Harley turned and headed from

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3. Plaintiffs note that "Harley never pointed his gun at the Deputies during the encounter in the lower driveway," referencing the officers' testimony that "he kept waving it around kind of" and did not directly point it at anyone. [Dkt. 130 — Pls.' Opp. Br., at 2-3; Dkt. 148 — Pls.' Am. Opp., at 10]. Even if the Court accepts Plaintiffs' contention as true, multiple Deputies testified that they observed Harley repeatedly wave the gun around during his interactions with them, and Plaintiffs do not present any evidence to dispute this testimony other than to say it is false. [Dkt. 148 — Pls.' Am. Opp. Br, at 20]. The Court will not quibble over whether waving a gun around in the direction of law enforcement officials while simultaneously blinding them with a spotlight equates to pointing the gun directly at them.

4. In response to this demand, Mr. O'Kelley told Harley that he had "pushed this too far for them to go away."

the lower driveway towards the upper driveway. He began pacing back and forth in the yard behind the fence, coming in and out of the Deputies' sight. His gun was holstered at this time. When he approached the fence, he repeatedly aimed his spotlight into the Deputies' eyes, making it harder for them to see him. Around the same time, at about 9:05pm, Mrs. O'Kelley arrived on the scene and walked up the driveway. She told the officers that she was Harley's mother and tried to speak with him. The officers managed to get her away from the scene and out of immediate danger.

C. The Shooting

As this standstill between Harley and the officers continued, additional law-enforcement officers arrived on the scene. Several Georgia State Patrol Officers, Jonathan Salcedo and Rodney Curtis, took up sniper positions with their rifles, and Sergeant Curran and Deputy Musgrave joined the other officers. Sergeant Curran was certified in the use of bean bag rounds, a less lethal use of force, though he had never used such a weapon in the line of duty, and he was armed with a shotgun that was loaded with these bean bag rounds. He was also armed with lethal firepower. Sergeant Curran saw that Harley's gun was holstered and did not believe there was a reason to use lethal force at that time.

The law enforcement officials on the scene did not think that they had time to get a warrant to go on the property. Instead, they formulated a plan by which they could use non-lethal force on Harley. Sergeant Curran and

Deputy Higdon (who was armed with his own gun) went past the privet hedge and jumped the fence, ultimately taking up positions in the space behind the O'Kelley's house, at each corner of the house. Sergeant Curran planned to wait for Harley to approach the fence, at which time he would shoot Harley in the right shoulder with a beanbag round. He believed that this would knock Harley down or back him up and stun his right arm—the arm Harley had previously held the gun with—and prevent Harley from drawing his weapon while Sergeant Curran disarmed him. Deputy Higdon planned to serve as cover for Sergeant Curran.

While Sergeant Curran and Deputy Higdon maneuvered into position, Deputy Kerger sought to draw Harley into a spot where Sergeant Curran could get a good shot at him with the non-lethal beanbags. She holstered her gun, stepped out into the open driveway, raised her hands, and approached the fence to speak to Harley. Deputy Kerger told Harley that she did not have her gun and asked him to put his own gun on the ground. In response, Harley approached the fence. He had his gun holstered at that time and was carrying a jug of water and his spotlight. However, he refused to take his gun out of the holster and put it on the ground.

While moving closer to the fence and Deputy Kerger, Harley then turned to his right and spotted Sergeant Curran in his hiding place. Harley shone his spotlight into Sergeant Curran's eyes, temporarily blinding him. Sergeant Curran fired three beanbag rounds from his shotgun at Harley, striking him. But Harley did not fall

down, as Sergeant Curran had intended. Instead, Harley then drew his own gun and fired back at Sergeant Curran two times, hitting him in the elbow. In response, several of the troopers shot back at Harley. Harley died in the shootout.

The total interaction between Harley and the law enforcement officers lasted approximately 30 minutes.

II. Procedural History

Plaintiffs filed suit against Defendants on Harley's behalf, asserting state law claims and federal law claims under 42 U.S.C. § 1983. [Dkt. 1]. The first federal claim alleged an unlawful warrantless seizure of Harley within the curtilage of his home, in violation of the Fourth Amendment, by Sergeant Curran, Deputies Higdon, Holloway, Kerger, and Musgrave, and Troopers Curtis and Salcedo. The second federal claim alleged that Sheriff Craig failed to adequately train the Deputies in arrest procedures and the use of force. Plaintiffs also alleged a state law wrongful-death claim against the Deputies.

Defendants filed motions to dismiss on qualified immunity and official immunity grounds. [Dkt. 7, 21]. The Court granted the motions and dismissed Plaintiffs' complaint on September 27, 2018. [Dkt. 31]. Plaintiffs appealed that dismissal [Dkt. 33], and the Eleventh Circuit affirmed in part but vacated and remanded in part. [Dkt. 40]. More specifically, the Eleventh Circuit vacated the dismissal of Plaintiffs' § 1983 unlawful-seizure claim

against Sergeant Curran and the Deputies[5] and the state law wrongful-death claim against Sergeant Curran and Deputy Kerger, permitting those claims to proceed. In so doing, the Eleventh Circuit held that the facts as alleged to that point did not show an "urgent need for immediate action" that would permit Defendants to cross the fence onto Plaintiffs' property and seize Harley without a warrant.

On August 18, 2021, Defendants filed a motion for summary judgment as to each of Plaintiffs' remaining claims, and Plaintiffs filed a motion for partial summary judgment as to the issue of curtilage. [Dkt. 113, 117]. Defendants opposed Plaintiffs' motion, and Plaintiffs filed a reply in support of their motion. [Dkt. 122, 127]. Separately, Plaintiffs opposed Defendants' Motion, and later amended their opposition. [Dkt. 130, 148]. In so doing, Plaintiffs abandoned or conceded several of their claims or components of their claims, including their claim that Harley was unlawfully seized in the lower driveway and their Fourth Amendment excessive force claim.[6] However, Plaintiffs do oppose Defendants' motion for summary judgment as to their state law wrongful-death

5. The Eleventh Circuit permitted the unlawful-seizure claim in the lower driveway to proceed against all five defendant deputies still in the case, but it limited the unlawful-seizure claim in the upper driveway to Defendants Curran and Higdon, dismissing the others.

6. Indeed, "Plaintiffs agree" that Harley "was not seized [in the lower driveway] at that time within the meaning of the Fourth Amendment," and that, "because Deputy Holloway remained in the lower driveway and did not assist in Curran's plan to seize Harley using beanbag rounds, Holloway is entitled to summary judgment." [Dkt. 148 — Pls.' Am. Opp., at 22-23]. Moreover, Plaintiffs make no mention whatsoever of their excessive force claim.

claim and their claim that Defendants Curran and Higdon unlawfully entered their property and seized Harley in the upper driveway. Defendants submitted a reply in support of their motion as to those claims. [Dkt. 155].

As a result of the narrowing of claims, the only issues that remain before the Court are Plaintiffs' position that the officers entered the curtilage of 1607 Carver Mill Road, and their state law wrongful-death claim and federal claim that the officers unlawfully entered their property and seized Harley in the upper driveway.

DISCUSSION

I. Legal Standard

The standard for summary judgment is well-established. Federal Rule of Civil Procedure 56 requires that summary judgment be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." "The moving party bears 'the initial responsibility of informing the . . . court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.'" *Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256, 1259 (11th Cir. 2004) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). Where the moving party makes such a showing, the burden shifts to the non-movant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does

exist. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

The applicable substantive law identifies which facts are material. *Id.* at 248. A fact is not material if a dispute over that fact will not affect the outcome of the case under the governing law. *Id.* An issue is genuine when the evidence is such that a reasonable jury could return a verdict in favor of the non-moving party. *Id.* at 249-50.

In resolving a motion for summary judgment, the court will "consider the record and draw all reasonable inferences in the light most favorable to the non-moving party." *Blue v. Lopez*, 901 F.3d 1352, 1357 (11th Cir. 2018). But the court is bound only to draw those inferences which are reasonable. "Where the records taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249-50 (citations omitted); *see also Matsushita*, 475 U.S. at 586 (once the moving party has met its burden under Rule 56(a), the non-moving party "must do more than simply show there is some metaphysical doubt as to the material facts").

Finally, the filing of cross-motions for summary judgment does not give rise to any presumption that no genuine issues of material fact exist. Rather, "[c]ross-

motions must be considered separately, as each movant bears the burden of establishing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law." *Shaw Constructors v. ICF Kaiser Eng'rs, Inc.*, 395 F.3d 533, 538-39 (5th Cir. 2004).

II. Federal Law Claim

Defendants move for summary judgment as to Plaintiffs' Fourth Amendment claim that the law enforcement officers unlawfully entered Plaintiffs' property and seized Harley in the upper driveway of their home. [Dkt. 113-1 - Defs.' Summ. J. Br., at 22-23, 28-38; Dkt. 155 — Defs.' Reply Br., at 2-4, 6-12]. In so doing, they ask this Court to rule as a matter of law that probable cause and exigent circumstances permitted the officers, specifically Sergeant Curran and Deputy Higdon, to enter Plaintiffs' property and seize Harley without a warrant. [*Id.*].

Conversely, but relatedly, Plaintiff move for partial summary judgment as to the issue of curtilage. [Dkt. 117-1 — Pls.' Partial Summ. J. Br., at 1-2, 7-22]. More specifically, they ask this Court to reject Sergeant Curran and Deputy Higdon's asserted defense that their seizure of Harley did not require a warrant because they allegedly did not enter the curtilage of 1607 Carver Mill Road, and instead to hold as a matter of law that the area into which Sergeant Curran and Deputy Higdon entered was within the curtilage of 1607 Carver Mill Road.[7] [*Id.*].

7. Plaintiffs point out that, at the motion to dismiss stage, Defendants conceded that Sergeant Curran and Deputy Higdon

In sum, the Court has two overlapping issues before it: first, whether Sergeant Curran and Deputy Higdon entered the curtilage of 1607 Carver Mill Road during their encounter with Harley, and second, whether Defendants unlawfully entered Plaintiffs' property and seized Harley in the upper driveway during the course of their interactions with him. If probable cause and exigent circumstances justified Sergeant Curran and Deputy Higdon's entry onto the property and seizure of Harley, then it is irrelevant whether they entered the curtilage

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entered the curtilage of 1607 Carver Mill Road. [Dkt. 117-1 — Pls.' Partial Summ. J. Br., at 2]. Accordingly, they argue that Defendants should now be prohibited from raising this defense and arguing that they did *not* enter the curtilage. [*Id.*]. That is a misinterpretation of the law. Courts routinely permit parties to raise arguments at the summary judgment stage that the parties previously conceded for purposes of motions to dismiss where the facts developed during discovery allow the parties to make such an argument. *See, e.g., Abdus-Sabur v. Hope Village, Inc.*, 221 F. Supp. 3d 3, 16 n.6 (D.D.C. 2016) ("[I]n response to plaintiff's opposition to its motion [to dismiss], defendant Hope Village conceded that the plaintiffs [] claims are timely brought for the purposes of its Rule 12(b)(6) motion, but reserved its right to raise this issue again at the summary judgment stage if any of the claims survive its motion to dismiss and discovery discloses a basis for raising a statute of limitations challenge.") (punctuation and quotations omitted); *Lucero v. Cenlar FSB*, 2015 U.S. Dist. LEXIS 112629, 2015 WL 5024047, at *4 (W.D. Wash. Aug. 25, 2015) ("Although Cenlar was willing to concede that it was a 'debt collector' for purposes of its motion to dismiss, it has now shown that, as a factual matter, it took over the servicing of plaintiff's mortgage years before the debt was in default."). Here, Defendants conceded this argument for the purpose of motions to dismiss, since the facts had to be construed in Plaintiffs' favor. However, now that the facts of this case have been more fully developed, they are free to raise the defense.

of 1607 Carver Mill Road (or, more specifically, whether the property even had a curtilage and, if so, whether Harley had a reasonable expectation of privacy within it). Accordingly, the Court first addresses the lawfulness of Sergeant Curran and Deputy Higdon's warrantless entry onto Plaintiffs' property and seizure of Harley.

A. Qualified Immunity Standard

The doctrine of qualified immunity "protects government officials who are sued under § 1983 for money damages in their individual capacities." *Hardigree v. Lofton*, 992 F.3d 1216, 1223 (11th Cir. 2021). It "aims to strike a balance between the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Walters v. Freeman*, 572 F. App'x. 723, 726 (11th Cir. 2014) (citation and quotations omitted). Accordingly, qualified immunity protects government officials who are engaged in discretionary functions and sued in their individual capacities unless they "violate clearly established federal statutory or constitutional rights of which a reasonable person would have known." *Id.* (citation, punctuation, and quotations omitted).

Courts use a two-step inquiry to decide whether qualified immunity should be granted. First, the party invoking the protection of qualified immunity "must establish that he or she acted within the scope of discretionary authority when the allegedly wrongful acts occurred." *Hardigree*, 992 F.3d at 1223 (citation

and quotations omitted). If so, the court must determine "whether the facts, viewed in the light most favorable to the party asserting the injury, show that the officer's conduct violated a constitutional right that was clearly established at that time." *Id.* at 1223-24 (citation and quotations omitted).

A right is "clearly established" if "the state of the law on the date of the alleged misconduct placed defendants on fair warning that their alleged treatment of the plaintiff was unconstitutional." *Id.* at 1224 (citation and quotations omitted). More specifically, rights may be clearly established for qualified immunity purposes by three methods: "(1) case law with indistinguishable facts clearly establishing the constitutional right; (2) a broad statement of principle within the Constitution, statute, or case law that clearly establishes a constitutional right; or (3) conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law." *Crocker v. Beatty*, 886 F.3d 1132, 1137 (11th Cir. 2018) (citation and quotations omitted).

B. Fourth Amendment Standards

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "At the Amendment's very core is the right of an individual to retreat into his or her own home and there be free from unreasonable governmental intrusion." *O'Kelley v. Craig*, 781 F. App'x. 888, 894 (11th Cir. 2019) (citation, punctuation, and quotations omitted);

see also Florida v. Jardines, 569 U.S. 1, 6, 133 S.Ct. 1409, 185 L. Ed. 2d 495 (2013) ("[W]hen it comes to the Fourth Amendment, the home is first among equals"). "This protection extends to the area immediately surrounding and associated with the home—what courts refer to as the 'curtilage'—which is regarded as part of the home itself for Fourth Amendment purposes." *Id.* (citation, punctuation, and quotations omitted).

"Given the special protection afforded the home, searches and seizures within a home or its curtilage and without a warrant are presumptively unreasonable." *Id.* at 894 (citations omitted). However, since "the ultimate touchstone of the Fourth Amendment is reasonableness," the warrant requirement that usually covers home searches is subject to certain exceptions. *Montanez v. Carvajal*, 889 F.3d 1202, 1208 (11th Cir. 2018) (citation and quotations omitted). Indeed, "[t]he Fourth Amendment's prohibitions against warrantless actions do not apply when the officers had both exigent circumstances and probable cause for their presence." *Ellison v. Hobbs*, 334 F. Supp. 3d 1328, 1349 (N.D. Ga. 2018) (citation and quotations omitted).

"Probable cause to arrest exists when the facts and circumstances within an officer's knowledge are sufficient to warrant a reasonable belief that the suspect had committed or was committing a crime, while probable cause to search requires a fair probability that contraband or evidence of a crime will be found in a particular place." *Feliciano v. City of Miami Beach*, 707 F.3d 1244, 1251 (11th Cir. 2013) (citation and quotations omitted). "In

emergencies, however, law enforcement officers are not motivated by an expectation of seizing evidence of a crime." *U.S. v. Holloway*, 290 F.3d 1331, 1337 (11th Cir. 2002). Rather, they "are compelled to search by a desire to locate victims and the need to ensure their own safety and that of the public." *Id.* (citation omitted). Therefore, "in an emergency, the probable cause element may be satisfied where officers reasonably believe a person is in danger." *Id.* (citations omitted).

"[I]n cases involving warrantless searches or seizures, law enforcement officers will be entitled to qualified immunity if they had even 'arguable probable cause.'" *Hardigree*, 992 F.3d at 1225 (quoting *Feliciano*, 707 F.3d at 1251)). "Arguable probable cause exists if reasonable officers in the same circumstances and possessing the same knowledge as the Defendants could have believed that probable cause existed." *Id.* (citation and quotations omitted).

"Exigent circumstances, in turn, arise when the inevitable delay incident to obtaining a warrant must give way to an urgent need for immediate action." *Feliciano*, 707 F.3d at 1251 (citation and quotations omitted). Exigent circumstances justifying a warrantless entry "may arise from a variety of situations, including when there is hot pursuit of a fleeing felon, or imminent destruction of evidence, or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling." *Hill v. Orange Cnty. Sheriff*, 666 F. App'x. 836, 839 (11th Cir. 2016) (citation or quotations omitted). "Emergency situations involving endangerment

to life fall squarely within the exigent circumstances exception." *Ellison*, 334 F. Supp. 3d at 1349 (citation and quotations omitted); *see also Smith v. LePage*, 834 F.3d 1285, 1292-93 (11th Cir. 2016) ("One of the most clear-cut justifications for entry without a warrant is an emergency involving a need to protect or preserve life. This can include the lives of people threatened by a suspect, or the suspect's life if he is suicidal.") (citations and quotations omitted).

Courts look to the "totality of the circumstances" in determining whether officers faced an emergency that justified acting without a warrant. *Hill*, 666 F. App'x. at 839 (citation omitted). Some of those circumstances include the gravity of the offense allegedly committed by the suspect; "whether there was reason to believe that the suspect was in the premises the officers entered and was armed; and whether delay could have allowed the suspect to escape or jeopardize the safety of the officers or the public." *Id.* (citation omitted).

In sum, "[a]n officer must have probable cause to believe that exigent circumstances exist, and the reasonableness of that belief is evaluated by reference to the circumstances then confronting the officer, including the need for a prompt assessment of sometimes ambiguous information concerning potentially serious consequences." *Smith*, 834 F.3d at 1293 (citation and quotations omitted).

C. Lawfulness of Defendants' Entry onto Plaintiffs' Property and Seizure of Harley

As a threshold matter, the Court concludes that Defendants were acting pursuant to their discretionary authority when the events at issue occurred. *See, e.g., Kesinger v. Herrington*, 381 F.3d 1243, 1248 (11th Cir. 2004) (officer's use of deadly force in altercation with defendant was clearly within the scope of his discretionary authority); *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002) (officer's arrest after investigating neighbor complaint was clearly within the scope of his discretionary authority). Accordingly, whether Defendants are entitled to qualified immunity depends on whether their conduct violated Harley's clearly established Fourth Amendment right to be free from warrantless search and seizure. To make this determination, the Court must decide whether probable cause and exigent circumstances justified—and thus rendered "reasonable"—Sergeant Curran and Deputy Higdon's warrantless entry onto Plaintiffs' property at 1607 Carver Mill Road and Defendants' seizure of Harley on that property.

1. Probable Cause

The Eleventh Circuit did not substantively address probable cause, assuming that such analysis was unnecessary because "no exception to the warrant requirement applied on the facts alleged." *O'Kelley*, 781 F. App'x. at 896.

Now, however, the Court finds that Defendants had probable cause to enter Plaintiffs' property and seize Harley. Earlier in the evening of October 24, 2015, Deputies Higdon, Holloway, and Kerger received a dispatch from a 911 operator relating a report of repeated and violent threats made toward a group of hunters at 1607 Carver Mill Road. Specifically, the hunters stated that someone had graphically threatened to shoot and mutilate them and feed their bodies to the dogs. The dispatch also reported that the hunters had observed a loud altercation between the person making the threats and an older man who might be his father or grandfather. The Deputies promptly met with the hunters, who recounted the same information. When the Deputies arrived at the address from which the threats came, they immediately encountered Mr. O'Kelley, who shared several additional pieces of troubling information with them: Harley (his stepson) was the one making threats, and he was armed, possessed two guns, and was "out of his ever-lovin' mind." Right after that, the Deputies first encountered Harley.

This is where the facts alleged by Plaintiffs in their complaint (and thus known to and accepted by the Eleventh Circuit at the motion to dismiss stage) do not fully and accurately depict the scene, as the discovery process has since made clear. Indeed, Plaintiffs' complaint alleges—and the Eleventh Circuit accepted—that Harley "did not engage in any violent or threatening behavior," as "[h]e never pointed the gun at the Deputies or threatened them with it, and the gun remained in his chest holster for the vast majority of the encounter." *O'Kelley*, 781 F. App'x. at 897. But, the Court now knows, that is misleading. To the

contrary, when the Deputies first saw Harley, he held a gun in his hand. He ignored repeated instructions to put the gun down. Instead, Harley repeatedly swept or waved the gun towards various Deputies while simultaneously blinding them with his spotlight,[8] accused them of trespassing, cursed at them, and encouraged them to open fire and shoot him in the back.

At the same time, Mr. O'Kelley interjected himself into the confrontation, yelling at Harley, accusing him of causing the problem, and refusing to leave. The standoff between Harley and the Deputies continued for several minutes, before Harley walked away from the officers, holstering his gun at this time. He began pacing back and forth in the yard and upper driveway, often disappearing into the darkness, and he intermittently shone the spotlight directly into the officers' faces. The officers did not know where the second gun that Mr. O'Kelley mentioned was or whether Harley would again unholster his gun.

Taken together, these facts were sufficient to support the officers' reasonable belief that Harley had committed a crime, such as making terroristic threats or threatening

8. It is worth reiterating that Plaintiffs dispute any intimation that Harley ever pointed his gun directly at any of the Deputies. And it is true that none of the officers stated or testified that Harley directly pointed his gun at them. However, that fact ignores multiple officers' undisputed testimony that Harley waved his gun around towards the Deputies and made sweeping passes with it in the direction of and over the Deputies while simultaneously blinding them with his spotlight. [Dkt. 155 — Defs.' Reply Br., at 8-10]. Importantly, this testimony was not available for the Eleventh Circuit to consider at the motion to dismiss stage.

to commit a crime of violence in violation of O.C.G.A. § 16-11-37(b)(1)(A), or was about to commit a crime, such as assault and battery in violation of O.C.G.A. §§ 16-5-20, 16-5-21, 16-5-23, and 16-5-24 (among other potential crimes). Moreover, given the fraught situation, it was reasonable for the officers to believe that people (including Harley, Mr. and Mrs. O'Kelley, and the officers themselves) were in danger, and they "need[ed] to ensure their own safety and that of the public." *Holloway*, 290 F.3d at 1337 (citation omitted).

Accordingly, the Court finds that Defendants had probable cause (or, at the least, arguable probable cause) to enter Plaintiffs' property and seize Harley without a warrant.

2. Exigent Circumstances[9]

In addition to probable cause, the officers' warrantless entry and seizure must have been justified by exigent circumstances. Exigent circumstances may include "danger to the arresting officers," the risk of harm to the public, and general endangerment to life. *See, e.g., Moore*

9. On appeal of this Court's Order granting Defendants' Motion to Dismiss, the Eleventh Circuit held that "no exception to the warrant requirement applied *on the facts alleged*" because "no reasonable officer would believe that Harley's conduct presented an *imminent* risk of serious injury to the Deputies or others." [Dkt. 40 — Opinion, at 14-15]. As the Eleventh Circuit itself noted, though, that conclusion was based on the facts alleged in Plaintiffs' complaint and construed most favorably to Plaintiffs. This Court now has before it a more fulsome picture of the facts and can consider this exception to the warrant requirement anew with these facts.

v. Gwinnett Cnty., 805 F. App'x. 802, 807 (11th Cir. 2020) (citation and quotations omitted); *Holloway*, 290 F.3d at 1334; *Ellison*, 334 F. Supp. 3d at 1349 (citation and quotations omitted). As this Court has already held, it was reasonable for the officers to conclude that Harley's erratic behavior posed a risk of harm to himself,[10] Mr. and Mrs. O'Kelley, and the officers themselves. Indeed, the original 911 call, about which the Deputies learned before arriving at the property, reported that Harley had violently and graphically threatened a group of hunters and that Harley and Mr. O'Kelley had just been engaged in a heated verbal argument. Then, when the officers arrived, Mr. O'Kelley informed them that Harley was armed with two guns and was out of his mind.

During Defendants' encounter with Harley, he repeatedly unholstered his gun, refused to put it down, and waved it towards the officers (or "swept" them) while simultaneously blinding them with his spotlight. He also loudly and repeatedly told the officers to shoot him in the back. While this was going on, Mr. O'Kelley continuously interjected, yelling at and potentially further aggravating Harley, while generally refusing to leave and get out of harm's way.

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10. Plaintiffs call Defendants' contention that they needed to protect Harley from self-harm "ludicrous," since "he never suggested that he wanted to harm himself." [Dkt. 148 — Pls.' Am. Opp. Br., at 20-21]. Even so, the officers' undisputed testimony states that Harley repeatedly demanded that they shoot him, and the officers could reasonably and objectively view that erratic behavior as reflecting a desire to be hurt (or killed) and therefore posing a serious risk to himself.

Looking at the totality of the circumstances, the Court finds that Sergeant Curran and Deputy Higdon's warrantless entry onto 1607 Carver Hill Road and Defendants' seizure of Harley was presumptively reasonable and justified by the exigent circumstance exception to the Fourth Amendment warrant requirement. Therefore, Defendants did not violate Harley's constitutional rights under the Fourth Amendment.

3. Qualified Immunity

Because Defendants did not violate a constitutional right, they are entitled to qualified immunity. However, even if Defendants had violated Harley's constitutional right to be free from warrantless search and seizure under the Fourth Amendment, the violation was not clearly established in this situation.

"The dispositive inquiry for purposes of deciding whether official conduct violated clearly established law is whether it would have been clear to a reasonable officer in the deputies' position that their conduct was unlawful in the situation they confronted." *Acre v. Chambers*, 648 F. App'x. 803, 806 (11th Cir. 2016) (citation and quotations omitted). Under the circumstances, Defendants reasonably concluded that there was an imminent threat of harm to Harley, themselves, and potentially even Mr. and Mrs. O'Kelley. "As the Supreme Court has explained, so long as they have good reason to believe such a threat exists, it would be silly to suggest that the police could not enter a home to determine whether violence (or threat of violence) has just occurred or is about to or soon will occur." *Id.*

(citing *Georgia v. Randolph*, 547 U.S. 103, 118, 126 S.Ct. 1515, 164 L. Ed. 2d 208 (2006)).

That is what Defendants did here. Based on the facts and circumstances shared with the Deputies and then observed by Defendants at the scene of the encounter with Harley, viewed in their totality, a reasonable officer in Defendants' position could have believed that violence was imminent, such that exigent circumstances warranted Sergeant Curran and Deputy Higdon's warrantless entry onto Plaintiffs' property and seizure of Harley to protect him, the O'Kelleys, and themselves.

Accordingly, Defendants are entitled to qualified immunity on Plaintiffs' federal Fourth Amendment claim.

III. State Law Wrongful-Death Claim

Defendants also move for summary judgment as to Plaintiffs' state law wrongful-death claim, arguing that they are entitled to official immunity because there is no evidence that they acted with malice or an intent to injure Harley. [Dkt. 113-1 — Defs.' Summ. J. Br., at 37-38; Dkt. 155 — Defs.' Reply Br., at 2]. Plaintiffs oppose Defendants' motion as to this claim, briefly arguing that the evidence "would permit a reasonable jury to find that the 'less-than-lethal' shooting that preceded the firefight was intentional and without justification by self-defense." [Dkt. 148 — Pls.' Am. Opp., at 23-24; Dkt. 154 — Pls.' Am. Opp., at 31-32].

"In Georgia, public agents are immune from liability for their discretionary acts unless they are done with malice or intent to injure." *Cantrell v. White*, 178 F. Supp. 3d 1308, 1318 (N.D. Ga. 2016) (citation, punctuation, and quotations omitted). For a plaintiff to overcome official immunity, then, he or she "must prove that the public agent acted with actual malice," which "is a demanding standard [that] requires an officer to act with a deliberate intention to do a wrongful act." *Id.* (citations and quotations omitted); *see also, e.g., Felio v. Hyatt*, 639 F. App'x. 604, 611 (11th Cir. 2016) (the standard "asks whether the defendant had a wicked motive, or intended to cause harm to the plaintiff, rather than just intending to do the act that resulted in the plaintiff's injury") (citation omitted); *Schwartz v. Gwinnett Cnty.*, 924 F. Supp. 2d 1362, 1378 (N.D. Ga. 2013) ("Actual malice does not include implied malice, or the reckless disregard for the rights and safety of others.") (citations and quotations omitted).

"In the context of a shooting by a police officer, the Supreme Court of Georgia has held that if the officer shot intentionally and without justification, then he acted solely with the tortious actual intent to cause injury and would not be protected by official immunity." *Id.* (citation, punctuation, and quotations omitted). "If, however, the officer shot in self-defense, then he had no actual tortious intent to harm." *Id.* (citation, punctuation, and quotations omitted).

Here, Plaintiffs have not raised a question of fact as to whether Defendants "acted with actual malice" or "with a deliberate intention to do a wrongful act." The

undisputed facts and officer testimony show that none of the Defendants had a wicked motive or intended to hurt or injure Harley; rather, they simply sought to de-escalate a volatile situation by disarming and restraining him. To do so, Defendants developed a plan whereby Sergeant Curran would shoot Harley in the shoulder with non-lethal beanbag rounds, temporarily stunning Harley so that the officers could retrieve his gun before he could use it on them or anyone else. It was not until Harley subsequently shot Sergeant Curran with his own gun that the other officers returned fire lethally and killed Harley.[11]

Perhaps recognizing that Defendants' lethal shooting of Harley was justified as self-defense and defense of others, Plaintiffs question Sergeant Curran's initial use of the beanbag rounds, arguing that "the 'less-than-lethal' shooting that preceded the firefight was intentional and without justification by self-defense." [Dkt. 148 — Pls.' Am. Opp., at 23-24]. But this argument assumes that, to overcome official immunity, it is sufficient to show that Defendants (particularly Sergeant Curran) intended to shoot Harley (non-lethally with the beanbag rounds). That is not the right standard. It is not enough for Plaintiffs to point out that Defendants "intend[ed] to do the act that resulted in the plaintiff's injury." *Felio*, 639 F. App'x. at 611 (citation omitted). Rather, Plaintiffs must show that Defendants intended to harm Harley, which they have not done here.

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11. Plaintiffs abandoned their excessive force claim against Defendants. Were that not the case, though, Defendants would be entitled to official immunity on that claim as well, because their use of lethal force against Harley was warranted after Harley shot Sergeant Curran.

Finally, to the extent Plaintiffs question the wisdom of Sergeant Curran's decision to shoot beanbag rounds at Harley,[12] that argument is also unavailing. "[T]he mere fact that a police officer's decisionmaking was 'misguided' or even 'reckless' is not enough to support a finding of actual malice." *Bohanan v. Paulding Cnty.*, 479 F. Supp. 3d 1345, 1365 (N.D. Ga. 2020) (citation omitted). As a result, Defendants are also entitled to summary judgment on Plaintiffs' state law wrongful-death claim.

CONCLUSION

For the foregoing reasons, Defendants Sergeant Travis Palmer Curran, a/k/a Travis Lee Palmer, Deputy Frank Gary Holloway, Deputy Keelie Kerger, Deputy Bill Higdon, and Deputy Todd Musgrave's Motion for Summary Judgment [Dkt. 113] is **GRANTED** and Plaintiffs Janet Turner O'Kelley, individually and as personal representative of the Estate of John Harley Turner, and John Allen Turner's Motion for Partial Summary Judgment [Dkt. 117] is **DENIED** as moot. The Clerk is **DIRECTED** to enter **FINAL JUDGMENT** in favor of Defendants and to **CLOSE** the case.

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12. Plaintiffs do not directly raise this argument in the portion of their brief devoted to their wrongful-death claim, but at various points they point out that Sergeant Curran "had never used the less-lethal shotgun in the line of duty" and note the officers' limited training "on how to use the less-lethal shotgun to disarm someone who has a gun." [Dkt. 154 — Pls.' Am. Opp., at 13].

SO ORDERED this 2nd day of February, 2022.

/s/ Richard W. Story
RICHARD W. STORY
United States District Judge

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JULY 16, 2019

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-14512
Non-Argument Calendar

JANET TURNER O'KELLEY, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN HARLEY TURNER, JOHN ALLEN TURNER,

Plaintiffs-Appellants,

v.

SHERIFF DONALD E. CRAIG, SGT. TRAVIS PALMER CURRAN, A.K.A. TRAVIS LEE PALMER, DEP. FRANK GARY HOLLOWAY, DEP. KEELIE KERGER, DEP. BILL HIGDON, DEP TODD MUSGRAVE, *et. al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia.

D.C. Docket No. 2:17-cv-00215-RWS.

July 16, 2019, Decided

Before MARCUS, ROSENBAUM, and JULIE CARNES, Circuit Judges.

Appendix C

PER CURIAM:

This case concerns a deadly encounter between John Harley Turner ("Harley") and several law-enforcement officers on the night of October 24, 2015. The officers made contact with Harley in the course of investigating a 911 call where a hunter reported that a resident, later determined to be Harley, had accused some hunters of trespassing on his land and had threatened them with bodily harm if they did not leave. Harley spoke with the officers from behind a closed gate on property he shared with his mother and her husband. Harley was armed and refused multiple commands to put the gun down, but he never threatened the officers or pointed the gun at them. After more than 30 minutes of fruitless negotiation, one of the officers lured Harley closer to the fence under the guise of inviting him to talk. As Harley approached, another officer, who had sneaked over the fence onto Harley's property, fired three rounds from a twelve-gauge shotgun filled with shot-filled beanbags, striking Harley. Harley returned fired, prompting the other officers to shoot and kill him.

Harley's mother and father, Janet Turner O'Kelley and John Allen Turner, respectively (collectively, "Plaintiffs"), filed suit under 42 U.S.C. § 1983, alleging several claims on his behalf, including (1) an unlawful-seizure claim against the officers who were involved in the events that led to Harley's death; and (2) a failure-to-train claim against Donald Craig, the Sheriff of Pickens County. They also brought a state-law claim for wrongful death. The district court granted the Defendants' motion to dismiss, which invoked the defenses of qualified and official immunity. Plaintiffs now appeal.

Appendix C

I.

At around 8:30 p.m. on October 24, 2015, a hunter called 911 to report that he and other hunters had been threatened by a resident while coon hunting.[1] The hunter claimed that a person on a neighboring property had yelled at them through the woods, accusing them of trespassing and threatening them with bodily harm if they did not leave. After ensuring that the hunter was safe, the 911 operator reported the incident to law enforcement as a "completed domestic disturbance."

Pickens County Deputies Bill Higdon, Frank Holloway, and Keelie Kerger responded to the call. They spoke with the hunter and then proceeded to the subject property at 1607 Carver Mill Road, arriving at around 9:00 p.m.

Harley lived at 1607 Carver Mill in a cabin behind the main house, which was occupied by Harley's mother, Janet Turner O'Kelley ("Mrs. O'Kelley"), and her husband, Stan O'Kelley ("Mr. O'Kelley"). The two residences were enclosed in a fence with a closed gate that blocked the driveway.

When the deputies arrived, they spoke with Mr. O'Kelley outside the closed gate. Mr. O'Kelley informed

1. We present the facts as alleged in Plaintiffs' complaint, accepting them as true for purposes of this appeal. *See Gates v. Khokhar*, 884 F.3d 1290, 1296 (11th Cir. 2018) ("When ruling on a motion to dismiss, we accept the facts alleged in the complaint as true, drawing all reasonable inferences in the plaintiff's favor." (quotation marks and alteration omitted)).

them that the 911 call was about his stepson Harley and that Harley was armed. The deputies sent Mr. O'Kelley to a neighbor's house.

Around this same time, Harvey, shirtless and armed with a pistol in a chest holster, approached the gate from the cabin with a flashlight talking loudly about trespassing. Shouting and with guns raised, the deputies ordered Harley to put his hands up and his gun down. The deputies did not immediately identify themselves as law-enforcement officers. Harley replied, "I already put the gun down," and asked, "Why are you trying to trespass?" One of the deputies responded, "We're not trespassing; we're cops."

Meanwhile, additional law-enforcement officers arrived on the scene. According to the complaint, State Troopers Rodney Curtis and Jonathan Salcedo "took up sniper positions" armed with rifles. Pickens County Deputies Travis Curran and Todd Musgrave joined the other deputies armed with shotguns, one of which was loaded with "less-lethal" beanbag rounds.

Harley began walking back towards his house with his hands above his head. He held the flashlight in one hand and the gun in the other. The deputies ordered him to put the gun down and get on the ground. Harley briefly turned around and told the officers to just keep trespassers off his property. He then turned back and continued on his way, while the deputies, with guns still pointed at him, ordered him to come back to the fence.

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Mrs. O'Kelley arrived at the property at around 9:05 p.m., just over 30 minutes after the 911 call and five minutes after the first deputies arrived. She saw that Deputy Curran had a shotgun, and she told the officers that there should be no shooting and that Harley would defend himself if they opened fire. The deputies would not let Mrs. O'Kelley talk to Harley, and they directed her away from the property.

A tense verbal back-and-forth ensued for approximately 30 minutes. The deputies repeatedly tried to get Harley to put his gun down. Harley paced back and forth, wearing his gun in the chest holster, and asserted that he simply wanted the officers to keep trespassers away from his property. Harley was distressed and perceived the officers as threatening him. Several times, he told them to "go ahead and shoot me." The deputies repeatedly assured Harley they would not shoot him.

In the middle of this back-and-forth, at around 9:12 p.m., Harley announced that he was tired and wanted to go to bed, and that he was going to his cabin to get a drink of water. While he was away, Deputies Curran and Higdon, armed with shotguns, crossed the fence into the property and took cover in order to "try to get a better position" for a shot on Harley.

Harley returned from his cabin with a flashlight in one hand and a jug of water in the other. His gun remained in his chest holster. He began talking to the deputies again, calling them trespassers and telling them: "I have never crossed this line, and y'all were the ones have been the

fuckin' aggressors." Harley announced that he was tired and would like to go to bed.

At Deputy Curran's urging, Deputy Kerger invited Harley to come talk at the fence for the purpose of drawing him closer to a spot where Curran could get a good shot. Kerger told Harley that she did not have her gun, and she indicated that she could take a statement from him if he put his gun down. Harley responded, "I already did." Kerger pointed out that the gun was still on Harley's chest. They continued talking, with Kerger saying that she would not talk with him until he took his gun out of its holster and put it on the ground.

About thirty seconds later, an officer stated in a low voice, "He's coming back towards the fence." At that point, Deputy Curran fired three beanbag rounds from his shotgun. At least one round struck Harley and knocked him down. Harley drew his pistol and returned fire. The other officers opened fire, killing Harley.

II.

In October 2017, Plaintiffs filed a complaint in the U.S. District Court for the Northern District of Georgia, alleging two federal claims under 42 U.S.C. § 1983. First, Plaintiffs alleged an unlawful warrantless seizure of Harley within the curtilage of his home, in violation of the Fourth Amendment, by Deputies Curran, Higdon, Holloway, Kerger, and Musgrave (the "Deputies"), and by Troopers Curtis and Salcedo (the "Troopers"). Second, Plaintiffs alleged that Sheriff Craig failed to adequately train deputies in arrest procedures and the use of force.

They also alleged a state-law wrongful-death claim against the Deputies.

The defendants filed motions to dismiss, invoking the federal defense of qualified immunity against the illegal-seizure claim and the state defense of official immunity against the wrongful-death claim. As to the failure-to-train claim, Sheriff Craig maintained that it failed because there was no underlying constitutional violation and because Plaintiffs' allegations were vague and conclusory. The district court granted the motions to dismiss, and Plaintiffs now appeal.

III.

We review *de novo* the grant of a motion to dismiss, accepting the allegations in the complaint as true and drawing all reasonable inferences in the plaintiff's favor. *Paez v. Mulvey*, 915 F.3d 1276, 1284 (11th Cir. 2019). "To withstand a motion to dismiss under Rule 12(b)(6), [Fed. R. Civ. P.], a complaint must include enough facts to state a claim to relief that is plausible on its face." *Hunt v. Aimco Props., L.P.*, 814 F.3d 1213, 1221 (11th Cir. 2016) (quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

IV.

Qualified immunity protects government officials from individual liability for job-related conduct unless

they violate clearly established law of which a reasonable person would have known. *Keating v. City of Miami*, 598 F.3d 753, 762 (11th Cir. 2013). "It serves the purpose of allowing government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation." *Carter v. Butts Cty.*, 821 F.3d 1310, 1318-19 (11th Cir. 2016) (quotation marks omitted). Because qualified immunity is a defense not only from liability, but from suit, the defense may be raised in a motion to dismiss. *Sebastian v. Ortiz*, 918 F.3d 1301, 1307 (11th Cir. 2019).

Officials invoking qualified immunity must show first that they were acting within the scope of their discretionary authority. *Id.* There is no dispute that the Deputies and Troopers were engaged in discretionary duties on the night of October 24, 2015. Accordingly, the burden shifted to Plaintiffs to show that qualified immunity did not apply. *See id.*

The qualified-immunity inquiry "turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." *Pearson v. Callahan*, 555 U.S. 223, 244, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (quotation marks omitted). "To deny qualified immunity at the motion to dismiss stage, we must conclude both that the allegations in the complaint, accepted as true, establish a constitutional violation *and* that the constitutional violation was 'clearly established.'" *Sebastian*, 918 F.3d at 1307 (emphasis in original). We may address these two prongs in either order. *Pearson*, 555 U.S. at 236.

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Plaintiffs contend that the Deputies and Troopers violated clearly established Fourth Amendment law when, in the absence of a warrant or exigent circumstances, they seized Harley within the curtilage of his home, trespassed on his property, and then used force against him that foreseeably caused his death.

A.

We start by considering whether the defendants transgressed Harley's Fourth Amendment rights on the night of October 24, 2015. Accepting the facts alleged in the complaint as true, we find that the Deputies did, but not the Troopers.

"[W]hen it comes to the Fourth Amendment, the home is first among equals." *Florida v. Jardines*, 569 U.S. 1, 6, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013). At the Amendment's "very core" is the right of an individual "to retreat into his [or her] own home and there be free from unreasonable governmental intrusion." *Id.* (quotation marks omitted). This protection extends to "the area immediately surrounding and associated with the home"—what courts refer to as the "curtilage"—which is regarded "as part of the home itself for Fourth Amendment purposes." *Id.* (quotation marks omitted).

Given the special protection afforded the home, searches and seizures within a home or its curtilage and without a warrant are presumptively unreasonable. *United States v. Walker*, 799 F.3d 1361, 1363 (11th Cir. 2015); *Bashir v. Rockdale Cty., Ga.*, 445 F.3d 1323, 1327 (11th Cir.

2006). This general rule is "subject only to a few jealously and carefully drawn exceptions," which are consent and exigent circumstances. *McClish v. Nugent*, 483 F.3d 1231, 1240 (11th Cir. 2007) (quotation marks omitted). Absent consent or exigent circumstances, probable cause alone is not enough to validate a warrantless search or arrest. *Bashir*, 445 F.3d at 1328. Nor may officers conduct a warrantless seizure under *Terry*[2] within the home without consent or exigent circumstances. *Moore v. Pederson*, 806 F.3d 1036, 1045 (11th Cir. 2015).

A variety of circumstances may give rise to an exigency sufficient to justify a warrantless entry, including law enforcement's need to provide emergency assistance, engage in "hot pursuit" of a fleeing suspect, or prevent imminent destruction of evidence. *Missouri v. McNeely*, 569 U.S. 141, 149, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013). Likewise, we have held that "emergency situations involving endangerment to life fall squarely within the exigent circumstances exception." *United States v. Holloway*, 290 F.3d 1331, 1337 (11th Cir. 2002). "While these contexts do not necessarily involve equivalent dangers, in each a warrantless [entry] is potentially reasonable because there is compelling need for official action and no time to secure a warrant." *McNeely*, 569 U.S. at 149 (quotation marks omitted); *Feliciano v. City of Miami*, 707 F.3d 1244, 1251 (11th Cir. 2013) ("Exigent circumstances . . . arise when the inevitable delay incident to obtaining a warrant must give way to an urgent need for immediate action." (quotation marks omitted)).

2. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) (permitting brief, investigatory seizures based on reasonable suspicion).

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We look to the "totality of the circumstances" to determine whether officers "faced an emergency that justified acting without a warrant." *McNeely*, 569 U.S. at 149. In other words, we must "evaluate each case of alleged exigency based on its own facts and circumstances." *Id.* at 150 (quotation marks omitted).

The Deputies and Troopers offer different arguments in support of the judgment in their favor. The Deputies concede that Harley was seized within the curtilage of his home and that Deputies Curran and Hidgon entered the curtilage without a warrant. But they contend that their conduct was reasonable because they had probable cause to arrest, or at least reasonable suspicion to conduct a *Terry* stop, and that exigent circumstances validated the warrantless seizure and entry. Further, they contend that Curran's use of beanbag rounds was a reasonable response to what the deputy viewed as a "potential deadly encounter."

For their part, the Troopers maintain that the allegations in the complaint do not implicate them in any of the alleged Fourth Amendment violations. They also dispute that Harley was within the curtilage of his home, and they contend that their actions—responding with lethal force once Harley opened fire—were objectively reasonable under the circumstances.

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1. Troopers

We address the Troopers' arguments first. Ultimately, we agree that the complaint does not state a plausible Fourth Amendment claim against them.

It is well established that § 1983 "requires proof of an affirmative causal connection between the official's acts or omissions and the alleged constitutional deprivation." *Zatler v. Wainwright*, 802 F.2d 397, 401 (11th Cir. 1986). Such a "causal connection" may be established by showing that "the official was personally involved in the acts that resulted in the constitutional deprivation." *Id.* "[T]he inquiry into causation must be a directed one, focusing on the duties and responsibilities of each of the individual defendants whose acts or omissions are alleged to have resulted in a constitutional deprivation." *Williams v. Bennett*, 689 F.2d 1370, 1381 (11th Cir. 1982).

Here, Plaintiffs did not allege sufficient facts, accepted as true, to show that Troopers Curtis and Salcedo were personally involved in the acts that resulted in the alleged constitutional deprivations. Before the fatal shooting, the Troopers' participation in the events at 1607 Carver Mill was limited to taking "sniper positions" with rifles. Plaintiffs contend that Harley was seized soon after by various commands, but the complaint indicates that it was the "the *deputies*" who "shouted at him to put the gun down and get on the ground" and then "ordered him to come back to the fence." Thus, despite the Troopers' presence on the scene, it does not appear from the complaint that they were personally involved in the acts that allegedly resulted

in Harley's seizure. Nor did they enter the property or fire the beanbag rounds that provoked the firefight. While the Troopers did respond with lethal force once Harley opened fire, Plaintiffs do not contend that this use of force was itself unreasonable, nor could we find that it was. Because the Troopers' acts or omissions were not alleged to have resulted in a constitutional deprivation, we affirm the dismissal of the complaint as to them.

Plaintiffs respond that the Troopers are liable for failing to intervene and prevent an excessive use of force. But as the district court noted, "[t]his theory of liability is not alleged in the Complaint." For that reason, we decline to consider whether the Troopers could be held liable under a failure-to-intervene theory. In any case, the complaint's allegations do not establish that the Troopers had time and were in a position to intervene. *See Priester v. City of Riviera Beach, Fla.*, 208 F.3d 919, 927 (11th Cir. 2000). Specifically, we cannot tell from the complaint whether the Troopers were even aware of Deputy Curran's plan to use force to end the encounter.

For these reasons, we affirm the judgment in favor of the Troopers.

2. Deputies

But as to the Deputies, we conclude that the complaint plausibly establishes that they violated Harley's Fourth Amendment rights. At the outset, we note that the parties agree on certain points. Plaintiffs and the Deputies agree that Harley was seized within the curtilage of his home—

exactly when is not particularly important for the time being—and that Deputies Curran and Higdon entered the curtilage. Because the Deputies lacked a warrant, the parties also agree that the Deputies needed consent or exigent circumstances. For purpose of this opinion only, we assume without deciding that the parties are correct on these matters.

While the parties dispute the existence of probable cause or reasonable suspicion, we need not address that issue. Even assuming probable cause to arrest existed, no exception to the warrant requirement applied on the facts alleged.

Harley clearly did not consent, and no exigent circumstances existed here. The Deputies contend, and the district court concluded, that exigent circumstances existed because they faced an "emergency situation[] involving endangerment to life." *Holloway*, 290 F.3d at 1337. This exception applies "[w]hen the police reasonably believe an emergency exists which calls for an immediate response to protect citizens from imminent danger." *Id.*

But no reasonable officer would believe that Harley's conduct presented an *imminent* risk of serious injury to the Deputies or others. By the time the officers arrived on the scene, the events that gave rise to the 911 call by the hunter were complete, the hunters were safely away from the property, and Harley was in his cabin. There had been no report of gunshots, only a verbal and conditional threat of bodily harm against a group of alleged trespassers who were no longer in the area. "This is not the stuff of which

life- or limb-threatening emergencies that constitute 'exigent circumstances' are made." *Moore*, 806 F.3d at 1045; *cf. Holloway*, 290 F.3d at 1338 ("The possibility of a gunshot victim lying prostrate in the dwelling created an exigency necessitating immediate search.").

The lack of exigent circumstances is further reinforced by the relatively minor nature of the offense. *See Welsh v. Wisconsin*, 466 U.S. 740, 753, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984) ("[A]n important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made."). Even if we assume that Harley's threat of harm to the hunters constituted a "terroristic threat" within the meaning of O.C.G.A. § 16-11-37(b)(1), it appears that it would qualify as only a misdemeanor offense under the statute. *See* O.C.G.A. § 16-11-37(d)(1) (stating that "[a] person convicted of the offense of a terroristic threat shall be punished as a misdemeanor," unless the threat "suggested the death of the threatened individual"). In these circumstances, according to the Supreme Court, "application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned." *Welsh*, 466 U.S. at 752-53 (noting that most courts "have refused to permit warrantless home arrests for nonfelonious crimes").

Nor did exigent circumstances arise at some point before Deputy Curran discharged his shotgun from within the curtilage of Harley's property. The mere presence of Harley's unconcealed gun did not give rise to exigent

circumstances.[3] *Cf. United States v. Santa*, 236 F.3d 662, 669 (11th Cir. 2000) ("The mere presence of contraband, however, does not give rise to exigent circumstances." (quotation marks omitted)). Our Constitution protects "the right to keep and bear arms for defense of the home," *Dist. of Columbia v. Heller*, 554 U.S. 570, 632, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), and no facts alleged in the complaint suggest that the Deputies had reason to believe that Harley's possession of the gun was unreasonably dangerous or even unlawful. *Cf. United States v. Burgos*, 720 F.2d 1520, 1526 (11th Cir. 1983) (exigent circumstances permitted warrantless entry of a house "laden with arms and an unknown number of people inside," where the officers had observed the homeowner, who previously had purchased 192 guns without a proper license, take possession of "two large boxes filled with arms").

To be sure, that Harley was distressed, refused to put down the gun, and was generally uncooperative indicates a fraught situation. But it does not show an "*urgent* need for *immediate* action." *Feliciano*, 707 F.3d at 1251 (emphasis added). Before Deputy Curran discharged his shotgun, Harley did not engage in any violent or threatening behavior. He never pointed the gun at the Deputies or threatened them with it, and the gun remained in his chest holster for the vast majority of the encounter. Plus,

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3. The cases the Deputies cite as factually analogous both involved seizures in public places, so they are unpersuasive in evaluating the situation here, involving a seizure within the curtilage of a home. *See Embody v. Ward*, 695 F.3d 577 (6th Cir. 2012) (seizure in a public park); *Deffert v. Moe*, 111 F. Supp. 3d 797 (W.D. Mich. 2015) (seizure on a public street).

he repeatedly informed the defendants that he simply wanted to end the encounter and go to sleep.

Moreover, Harley's failure to put down the gun, despite the Deputies' orders, did not create an exigency. If exigent circumstances did not exist at the time those commands were made, as we have concluded, Harley was not validly seized at the time those commands were made. And because he was not validly seized, he was not required to comply with the Deputies' commands. *See Moore*, 806 F.3d at 1045 (absent exigent circumstances or a warrant, a seizure inside the home is not valid and the occupant is "free to decide not to answer [the officer's] questions"). So his failure to comply with the Deputies' unlawful orders cannot, in and of itself, give rise to exigent circumstances.

Finally, as to the initial shooting by Deputy Curran, the allegations in the complaint indicate that Harley approached the fence as part of a ruse engineered by Curran—for the purpose of drawing Harley closer to a spot where Curran could get a good shot—so the deputy's decision to fire upon Harley with beanbag rounds cannot be justified as a split-second response to a perceived threat.

Considering the totality of the circumstances, it was not reasonable for the Deputies to believe that they "faced an emergency that justified acting without a warrant." *McNeely*, 569 U.S. at 149. We therefore conclude Plaintiffs plausibly established that the Deputies violated Harley's constitutional rights when, in the absence of a warrant or exigent circumstances, they seized him within the

curtilage of his home and entered the curtilage for the apparent purpose of conducting an arrest. Because this conduct was unlawful, "there [wa]s no basis for any threat or any use of force." *Jackson v. Sauls*, 206 F.3d 1156, 1171 (11th Cir. 2000); *see Zivojinovich v. Barner*, 525 F.3d 1059, 1071 (11th Cir. 2008) ("even *de minimis* force will violate the Fourth Amendment if the officer is not entitled to arrest or detain the suspect"). So we vacate the dismissal of Plaintiffs' § 1983 unlawful-seizure claim against the Deputies and remand for further proceedings consistent with this opinion.[4]

B.

We also conclude that clearly established law as of October 24, 2015, put the Deputies on notice that their conduct was unlawful. "The touchstone of qualified immunity is notice." *Moore*, 806 F.3d at 1046. "The violation of a constitutional right is clearly established if a reasonable official would understand that his conduct violates that right." *Id.* at 1046-47.

In *Moore*, decided on October 15, 2015, we held that "an officer may not conduct a *Terry*-like stop in the home in the absence of exigent circumstances," consent, or a warrant. *Id.* at 1047, 1054. Thus, binding precedent clearly established, at the time of the encounter on October 24, 2015, that a seizure or entry within the home without a

4. To the extent Plaintiffs contend they established an excessive-force claim even if exigent circumstances justified the seizure and entry, this is a "discrete claim," *Jackson*, 206 F.3d at 1171, that was not raised below, so we decline to address it on appeal.

warrant or exigent circumstances violates the Fourth Amendment's prohibition on unreasonable searches and seizures. And the parameters of the exigent-circumstances doctrine were well-established before then, including, as relevant here, that circumstances do not qualify as exigent unless "the police reasonably believe an emergency exists which calls for an immediate response to protect citizens from imminent danger." *Holloway*, 290 F.3d at 1337.

Here, no reasonable officer could believe that he or she "faced an emergency that justified acting without a warrant." *McNeely*, 569 U.S. at 149. Based on the factual allegations in the complaint, which we must accept as true, this was not a situation where it would be "difficult for an officer to determine how the relevant legal doctrine"—here exigent circumstances—would apply. *Mullenix v. Luna*, 577 U.S. , , 136 S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015) (quotation marks omitted). There are no facts alleged in the complaint indicating that, notwithstanding Harley's possession of a firearm, this was an "emergency situation[] involving endangerment to life." *Holloway*, 290 F.3d at 1337. Accordingly, qualified immunity is not appropriate at this stage, though the Deputies are free to raise the defense again in a motion for summary judgment.

V.

As for Plaintiffs' failure-to-train claim against Sheriff Craig, we affirm the dismissal of this claim. Supervisors cannot be held liable under § 1983 on the basis of vicarious liability. *Keith v. DeKalb Cty., Ga.*, 749 F.3d 1034, 1047 (11th Cir. 2014). "Instead, to hold a supervisor liable a

plaintiff must show that the supervisor either directly participated in the unconstitutional conduct or that a causal connection exists between the supervisor's actions and the alleged constitutional violation." *Id.* at 1047-48. A plaintiff may prove such a causal connection in several ways, including when the supervisor's policy or custom results in deliberate indifference to constitutional rights. *Id.* at 1048.

Plaintiffs contend that Sheriff Craig exhibited deliberate indifference to his constitutional rights by failing to institute adequate policies and training to govern arrest procedures and the use of force by his deputies. But even if the facts alleged show that the Deputies were inadequately trained, to establish the Sheriff's liability under § 1983, Plaintiffs needed to show that the Sheriff "knew of a need to train and/or supervise in a particular area and . . . made a deliberate choice not to take any action." *See Gold v. City of Miami*, 151 F.3d 1346, 1350-51 (11th Cir. 1998). Plaintiffs have not made this showing. They simply allege in conclusory fashion that the Sheriff's training policies were inadequate. But they do not offer any specifics of current training or whether the Sheriff was aware of any similar prior incidents, so we cannot infer that he was on notice that current training was inadequate. *See id.* Accordingly, Plaintiffs' allegations are insufficient to sustain a plausible claim against the Sheriff for failure to train under § 1983.

VI.

Finally, we consider whether the Deputies are entitled to official immunity under Georgia state law. Under

Appendix C

Georgia's doctrine of official immunity, state public officials are not personally liable for discretionary acts performed within the scope of their official authority unless "they act with actual malice or with actual intent to cause injury in the performance of their official functions." Ga. Const. art. I, § 2, ¶ IX(d); *Murphy v. Bajjani*, 282 Ga. 197, 647 S.E.2d 54, 60 (Ga. 2007). Thus, "[t]o overcome official immunity, the plaintiff must show that the officer had 'actual malice or an intent to injure.'" *Smith v. LePage*, 834 F.3d 1285, 1297 (11th Cir. 2016) (quoting *Cameron v. Lang*, 274 Ga. 122, 549 S.E.2d 341, 344 (Ga. 2001)).

Plaintiffs argue that they overcame official immunity because they alleged an intentional unjustified shooting. "In a police shooting case, [the official-immunity] analysis often comes down to whether the officer acted in self-defense." *Id.* If a suspect is shot in self-defense, then there is "no actual tortious intent to harm him." *Id.* (quoting *Kidd v. Coates*, 271 Ga. 33, 518 S.E.2d 124, 125 (Ga. 1999)). If, however, the suspect is shot "intentionally and without justification," then the officer "acted solely with the tortious actual intent to cause injury." *Id.*

Here, no deadly force against Harley was used until he opened fire on the Deputies. At that point, the Deputies' conduct was justified by self-defense and is, accordingly, shielded from tort liability by the doctrine of official immunity. *See Kidd*, 518 S.E.2d at 125-26.

Accepting the facts in the complaint as true, however, Plaintiffs plausibly alleged that the "less-than-lethal" shooting that preceded the firefight was intentional and

without justification by self-defense, for similar reasons as explained above with regard to the § 1983 unlawful-seizure claim. In particular, because Harley appears to have approached the fence as part of a ruse engineered by Deputy Curran and assisted by Deputy Kerger, so that Curran could get a better shot at Harley, the shooting cannot reasonably be described as defense of self or others. We therefore vacate and remand for further proceedings on this claim.

Nevertheless, it appears from the allegations that only Deputies Curran and Kerger are proper defendants to this claim. The complaint alleges that they, and no other deputies, acted in concert to commit the tortious conduct that foreseeably caused Harley's death. *See, e.g.*, *Madden v. Fulton Cty.*, 102 Ga. App. 19, 115 S.E.2d 406, 409 (Ga. Ct. App. 1960) ("persons acting in concert under certain situations may be liable for the acts of others"); Restatement (Second) of Torts § 876 (1979). The fact that the other deputies were present on the scene and marginally involved is not enough. *See Madden*, 115 S.E.2d at 409 ("If the participation is slight, there is no liability."). We therefore conclude that the remaining deputies (Higdon, Holloway, and Musgrave) are entitled to official immunity for this claim.

VII.

For the foregoing reasons, we vacate the dismissal of Plaintiffs' § 1983 unlawful-seizure claim against the Deputies and the state-law wrongful-death claim against Deputies Curran and Kerger. We affirm the

dismissal of Plaintiffs' § 1983 claims against Sheriff Craig and Troopers Curtis and Salcedo, as well as the state-law wrongful-death claim against Deputies Higdon, Holloway, and Musgrave. We remand this case for further proceedings consistent with this opinion.

VACATED AND REMANDED IN PART; AFFIRMED IN PART.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, FILED SEPTEMBER 27, 2018

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. 2:17-CV-00215-RWS

JANET TURNER O'KELLEY, INDIVIDUALLY
AND AS PERSONAL REPRESENTATIVE OF
THE ESTATE OF JOHN HARLEY TURNER;
AND JOHN ALLEN TURNER,

Plaintiffs,

v.

SHERIFF DONALD E. CRAIG, *et al.*,

Defendants.

September 27, 2018, Decided
September 27, 2018, Filed

ORDER

This case comes before the Court on Defendants Salcedo and Curtis' Motion to Dismiss [7] and Pickens

Sheriff's Office Defendants'[1] Motion to Dismiss [21]. After reviewing the record the Court enters the following order.

BACKGROUND

This case arises out of a series of events on October 24, 2015, which ultimately led to the shooting death of John Harley Turner ("Turner") by Pickens County Sheriff Deputies and Georgia State Patrol Officers. The following facts are taken from Plaintiffs' Complaint [1] and, for purposes of Defendants's Motions to Dismiss, are accepted as true. *Cooper v. Pate,* 378 U.S. 546, 546, 84 S. Ct. 1733, 12 L. Ed. 2d 1030 (1964).

On October 24, 2015, three Pickens County Sheriff Deputies, Frank Holloway, Keelie Kerger, and Bill Higdon, responded to a 911 call for "a completed domestic disturbance" from Kevin Moss. (Compl., Dkt. [1-1] ¶ 24.) Moss reported that he and some others had been accused of trespassing and threatened with bodily harm while hunting near Carver Mill Road. (*Id.* ¶ 22.) The deputies met Moss at the intersection of Carver Mill Road and Dean Mill Road and then proceeded to 1607 Carver Mill Road.[2] (*Id.* ¶ 25.)

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1. In addition to Sheriff Donald E. Craig, the Pickens Sheriff's Office Defendants are: (1) Sgt. Travis Palmer Curran; (2) Frank Gary Holloway; (3) Keelie Kerger; (4) Bill Higdon; and (5) Todd Musgrave.

2. Turner, his mother, Janet Turner O'Kelley, and her husband, Stan O'Kelley, live at 1607 Carver Mill Road. (Compl., Dkt. [1] ¶ 26.) The main house is occupied by Plaintiff Janet Turner

The Deputies arrived at the premises around 9:00 p.m. and met Mr. O'Kelley. (*Id.)* Mr. O'Kelley informed the deputies that Turner had threatened the hunters and that Turner was currently armed. (*Id.* ¶ 28.) Turner approached the deputies, armed with a pistol in a chest holster. (*Id.* ¶ 29.) The deputies ordered Turner to put down his gun. (*Id.* ¶ 30.) Turner asked the deputies why they were trespassing, and the deputies informed Turner that they were "cops." (*Id.)*

Shortly after, Deputy Todd Musgrave, Deputy Travis Curran, and two Georgia State Patrol Officers, Jonathan Salcedo, and Rodney Curtis, arrived at the premises. (*Id.* ¶ 31.) Curran had two shotguns, one that was loaded with beanbag rounds. (*Id.)* The two Georgia State Patrol officers were armed with rifles and took "sniper positions." (*Id.)* By this time, Turner had un-holstered his pistol and was carrying it above his head. (*Id.* ¶ 32.) The deputies continued to ask Turner to put down the gun and get on the ground. (*Id.)*

Ms. O'Kelley arrived home around 9:05 p.m. (*Id.* ¶ 34). Ms. O'Kelley told the deputies "that [Turner] would defend himself if [the deputies] opened fire." (*Id.)* The deputies sent Ms. O'Kelley back down the driveway and out of the way. (*Id.)*

O'Kelley and Stan O'Kelley, while Turner lived in a small house behind the main house. (*Id.)* Both houses are enclosed by a fence and gated. (*Id.)*

For the next half-hour, Turner (who had returned the pistol to his chest holster) and went back and forth with the deputies—Turner, on the one hand, wanting trespassers off his property, and the officers, on the other, wanting Turner to put the gun down. (*Id.* ¶ 35.) During the exchange, Turner did not verbally threaten or point his gun toward the deputies, nor did he leave the gated area. (*Id.* ¶¶ 37-38.) During the exchange, Turner was "distressed" and challenged the deputies to "go ahead and shoot [him]." (*Id.* ¶ 36.) The deputies "repeatedly reassured [Turner] that they were not going to shoot him." (*Id.)*

Around 9:12 p.m., Curran and Higdon moved to "get a better position" which involved crossing the fence to Turner's residence. (*Id.* ¶ 39.) The deputies moved into place while Turner was in his cabin getting water. (*Id.* ¶ 40.) When Turner came back outside, he told the deputies again that they were trespassers and that he wanted them to leave. (*Id.* ¶ 41.)

Deputy Kerger, who was unarmed, introduced herself to Turner and asked that he put down his gun and come speak with her. (*Id.* ¶ 42.) Turner responded that he did not have his gun, which was openly in his chest holster. (*Id.)* The deputies continued to tell Turner that they would not speak with him unless he took his gun out of the holster and put it on the ground. (*Id.)*

Turner, still armed, started to make his way toward the fence where Kerger was standing. (*Id.* ¶ 43.) Deputy Curran fired three beanbag rounds from his shotgun,

knocking Turner to the ground. (*Id.)* In response, Turner drew his pistol and fired. (*Id.* ¶ 43.) The other deputies returned fire. (*Id.* ¶ 44). Turner was shot and died at the scene. (*Id.)*

Plaintiffs Janet Turner O'Kelley, individually and as personal representative of the Estate of John Harley Turner, and John Allen Turner brought this suit against Sheriff Craig, Sergeant Curran, Deputy Holloway, Deputy Kerger, Deputy Higdon, Deputy Musgrave, Officer Slacedo, and Officer Curtis. Plaintiffs brings her claims under both federal and state law. In particular, Plaintiffs allege causes of action under 42 U.S.C. § 1983 for violations of Turner's constitutional rights under the Fourth and Fourteenth Amendments (Count I and IV).[3] Plaintiffs further allege a failure to train claim (Count

3. Plaintiffs entitle their first cause of action "Violations of Fourth and Fourteenth Amendments" without making reference to 42 U.S.C. § 1983. Because Plaintiffs are seeking monetary relief, the Court construes Count I as a claim under Section 1983. *See Livadas v. Bradshaw,* 512 U.S. 107, 132, 114 S. Ct. 2068, 129 L. Ed. 2d 93 (1994) (describing Section 1983's role as a vehicle through which individuals may seek redress when their federally protected rights have been violated). Furthermore, it is the Fourth Amendment that prohibits an unreasonable seizure of a person and governs claims of excessive force "in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen . . . ." *Id.* at 395. The arguments in Plaintiffs' briefs also rely solely on the Fourth Amendment. Thus, the Court assumes the Complaint's reference to the Fourteenth Amendment is limited to its incorporation of the Fourth Amendment into the states and their local governmental entities. Accordingly, the Court simply uses the term Fourth Amendment in this Order.

II). And, Plaintiffs raise claims under Georgia tort law for wrongful death (Count III). Finally, Plaintiffs assert that they are entitled to reasonable attorney's fees (Count V).[4] Defendants now move to dismiss each of those claims pursuant to Federal Rule of Civil Procedure 12(b)(6). (Mot. To Dismiss Defs.' Salcedo and Curtis, Dkt. [7]; Mot. To Dismiss Compl., Dkt. [21].) The Court sets out the legal standard governing Defendants' Motions to Dismiss before considering the motions on their merits.

DISCUSSION

I. Legal Standard

Federal Rule of Civil Procedure 8(a)(2) requires that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." While this pleading standard does not require "detailed factual allegations," "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

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4. Plaintiffs also contend, in one of their response briefs, that those officers who did not shoot Turner are liable for failing to intervene. (Pl.'s Br. In Opp. To Pickens Sheriff's Office Defs.' Pre-Answer Mots. To Dismiss, Dkt. [22] at 19-20.) This theory of liability is not alleged in the Complaint, and "[a] plaintiff cannot amend the complaint by arguments of counsel made in opposition to a motion to dismiss." *In re Androgel Antitrust Litig. (No. II),* 687 F. Supp. 2d 1371, 1381 (N.D. Ga. 2010) (quoting *Kuhn v. Thompson,* 304 F. Supp. 2d 1313, 1321 (M.D. Ala. 2004)). But, for the reasons laid out in this Order, the Court need not consider the merits of that argument, at any rate.

To withstand a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly,* 550 U.S. at 570). A complaint is plausible on its face when the plaintiff pleads factual content necessary for the court to draw the reasonable inference that the defendant is liable for the conduct alleged. *Id.*

At the motion to dismiss stage, "all well-pleaded facts are accepted as true, and the reasonable inferences therefrom are construed in the light most favorable to the plaintiff." *Bryant v. Avado Brands, Inc.,* 187 F.3d 1271, 1273 n.1 (11th Cir. 1999). However, the same does not apply to legal conclusions set forth in the complaint. *Sinaltrainal v. Coca-Cola Co.,* 578 F.3d 1252, 1260 (11th Cir. 2009) (citing *Iqbal,* 556 U.S. at 678). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal,* 556 U.S. at 678. Furthermore, the court does not "accept as true a legal conclusion couched as a factual allegation." *Twombly,* 550 U.S. at 555.

II. Analysis

Defendants move to dismiss Plaintiffs' Complaint on three grounds. First, Defendants argue that the Pickens County Sheriff's Deputies and Georgia State Patrol Officers are entitled to qualified immunity for claims under 42 U.S.C. § 1983. Second, Defendants argue that Plaintiffs do not allege sufficient facts to hold Sheriff Craig liable for failure to train. Finally, Defendants argue that Plaintiffs' state law claims against the Deputies and Officers are

barred by the doctrine of official immunity. Plaintiffs oppose Defendants' motions, arguing that Defendants are not protected by official or qualified immunity for the conduct underlying Plaintiffs' state or federal claims respectively, and that the Complaint alleges sufficient facts to make out a plausible failure to train claim. Using the legal framework set forth above, the Court examines Plaintiffs' claims to determine whether the Complaint states a claim upon which relief may be granted.

A. Federal Claims Against the Pickens County Sheriff's Deputies and Georgia State Patrol Officers

"In order to prevail in a civil rights action under Section 1983, 'a plaintiff must make a prima facie showing of two elements: (1) that the act or omission deprived plaintiff of a right, privilege or immunity secured by the Constitution or laws of the United States, and (2) that the act or omission was done by a person acting under color of law.'" *Marshall Cty. Bd. of Educ. v. Marshall Cty. Gas Dist.,* 992 F.2d 1171, 1174 (11th Cir. 1993) (quoting *Bannum, Inc. v. City of Ft. Lauderdale,* 901 F.2d 989, 996-97 (11th Cir. 1990)).

However, the doctrine of qualified immunity "offers complete protection for government officials sued in their individual capacities if their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Vinyard v. Wilson,* 311 F.3d 1340, 1346 (11th Cir. 2002) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). To claim qualified

immunity, a defendant must first show he was performing a discretionary function. *Moreno v. Turner,* 572 F. App'x 852, 855 (11th Cir. 2014). "Once discretionary authority is established, the burden then shifts to the plaintiff to show that qualified immunity should not apply." *Edwards v. Shanley,* 666 F.3d 1289, 1294 (11th Cir. 2012) (quoting *Lewis v. City of W. Palm Beach*, 561 F.3d 1288, 1291 (11th Cir. 2009). A plaintiff demonstrates that qualified immunity does not apply by showing: "(1) the defendant violated a constitutional right, and (2) the right was clearly established at the time of the alleged violation." *Moreno,* 572 F. App'x at 855.

As a threshold matter, the Court concludes that Defendants were acting pursuant to their discretionary authority when the events at issue occurred. *See, e.g., Kesinger v. Herrington,* 381 F.3d 1243, 1248 (11th Cir. 2004) (officer's use of deadly force in altercation with defendant was clearly within the scope of his discretionary authority); Vinyard v. Wilson, 311 F.3d 1340, 1346 (11th Cir. 2002) (officer's arrest after investigating neighbor complaint was clearly within the scope of his discretionary authority). Thus, there are two remaining inquiries: whether Plaintiffs have alleged sufficient facts in the Complaint to illustrate a violation of a constitutional right and, if so, whether that right was clearly established at the time in question.

1. Fourth Amendment Violation

Plaintiffs contend that Turner's Fourth Amendment rights were infringed based upon trespass and excessive

force. It is a "basic principle of Fourth Amendment law" that searches and seizures inside a home without a warrant are presumptively unreasonable." *Bashir v. Rockdale Cty.*, 445 F.3d 1323, 1327 (11th Cir. 2006). This freedom from unreasonable searches and seizures includes "the right to be free from the use of excessive force in the course of an investigatory stop, or other 'seizure' of the person." *Kesinger,* 381 F.3d at 1248 (citing *Graham v. Connor,* 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) and *Tennessee v. Garner,* 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985)).

The test to determine whether a violation of the Fourth Amendment occurred is an objective one. The Court must ask whether the Defendants' conduct was objectively reasonable in light of the facts and circumstances confronting them, regardless of any underlying intent or motive. *Id.* Each officer's conduct "must be judged from the perspective of a reasonable officer on the scene, rather than with 20/20 vision of hindsight." *Id.* Applying this standard at the motion to dismiss stage, the Court finds that Plaintiffs have not set forth facts sufficient to establish that either the fatal shooting or the events leading up to it were objectively unreasonable under the circumstances.

Plaintiffs assert that because there was no warrant authorizing Defendants "to come onto the O'Kelley property or to seize [Turner] against his will within the curtilage of his home" the trespass of Deputies Curran and Higdon and the excessive force used by all Defendants

violated Turner's Fourth Amendment freedoms.[5] (Compl., Dkt. [1] ¶ 46.) Plaintiffs further allege that no legal exception applies to the lack of warrant. (*Id.* ¶ 48.) While it is undisputed that the Deputies did not have a warrant prior to the seizure, even a warrantless arrest in a home is permitted if the officer "had probable cause to make the arrest and either consent to enter or exigent circumstances demanding that the officer enter the home without a warrant." *Bashir*, 445 F.3d at 1328.

a. Probable Cause

"Probable cause exists when the facts and circumstances within the officer's knowledge, of which he or she has reasonably trustworthy information, would cause a prudent person to believe, under the circumstances, that the suspect has committed, is committing, or is about to commit an offense.'" *Kinzy v. Warren*, 633 F. App'x 705, 707 (11th Cir. 2016) (internal quotations omitted). For an officer to be shielded by qualified immunity, the officer does not need to have actual probable cause but rather arguable probable cause. *Id.* "Arguable probable cause is present where reasonable officers in the same circumstances and possessing the same knowledge as the defendant could have believed that probable cause existed." *Id.*

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5. As the question of whether the premises surrounding the home constitutes curtilage is a question of fact, at this stage in the litigation it will be taken as true that Turner was seized within the curtilage of his home. *See United States v. Berrong,* 712 F.2d 1370, 1375 (11th Cir. 1983).

Appendix D

Defendants claim that there was arguable probable cause for both the trespass as well as the use of excessive force. Plaintiffs dispute this position for two reasons: first, that the facts alleged do not satisfy Georgia's terroristic threat statute, and second, that Turner's non-cooperation with the Deputies did not create probable cause for the seizure. The Court disagrees and finds that Defendants' conduct was supported by arguable probable cause.

As for Georgia's terroristic threat statute, that law, in relevant part, makes it a crime to threaten to "[c]ommit any crime of violence[.]" O.C.G.A. § 16-11-37(b)(1)(A). Defendants, here, were responding to a 911 call in which the caller specifically referenced a potential threat of bodily harm. (Compl., Dkt. [1-1] ¶ 22 (describing a 911 call in which a hunter told the operator that "a person on a neighboring property had yelled at [him and his companions] through the woods, accusing them of trespassing and threatening them with bodily harm if they did not leave"); *id* ¶ 24 (911 operator reported the call to Pickens County Sheriff's deputies and dispatched them to the scene); *id.* ¶ 25 (Deputies spoke to the caller before proceeding to Plaintiffs' residence)); *see also Poole v. State,* 326 Ga. App. 243, 756 S.E.2d 322, 327 (Ga. Ct. App. 2014) ("[T]he essential elements of terroristic threats and acts are: (1) a threat to commit any crime of violence (2) with the purpose of terrorizing another."). An officer is not required to prove every element of a crime prior to making an arrest, as this would "transform arresting officers into prosecutors." *Lee v. Ferraro,* 284 F.3d 1188, 1195 (11th Cir. 2002) (quoting *Scarbrough v. Myles,* 245 F.3d 1299, 1303 (11th Cir. 2001)). Thus, based on the

emergency phone call, Defendants had arguable probable cause to believe Turner violated the terroristic threat statute.

Likewise, Defendants had arguable probable cause to seize Turner based on his failure to cooperate and the attenuating circumstances. Indeed, as Defendants say, it is not Turner's non-cooperation alone that establishes probable cause, but rather the entirety of the circumstances. Lee, 284 F.3d at 1195 ("For probable cause to exist, . . . an arrest must be objectively reasonable based on the totality of the circumstances."). The Complaint alleges that Defendants were responding to a 911 call of a threat of bodily harm. (Compl., Dkt. [1] ¶ 22.) When Defendants arrived at the premises, Turner was armed and agitated. (*Id.* ¶ 29.) Ms. O'Kelley, who arrived shortly thereafter, informed the officers that Turner would "defend himself." (*Id.* ¶ 34.) When the officers tried to get Turner to put down the gun, he denied being armed. (*Id.* ¶ 30.) During the interaction, Turner became distressed, held the pistol above his head, and even challenged the officers to shoot him. (*Id.* ¶¶ 32, 36.) When Turner, who was still armed, made his way toward an unarmed deputy, a fellow deputy used non-lethal force to stop him. (*Id.* ¶ 43.) Only after Turner used deadly force, did Defendants respond with equal force. (*Id.* ¶¶ 43-44.) Therefore, Defendants had arguable probable cause for the seizure.

b. Exigent Circumstances

While probable cause itself does not validate a warrantless home seizure, the seizure may be justified

by exigent circumstances.[6] The exigent circumstance exception permits a warrantless entry "when there is compelling need for official action and no time to secure a warrant." *United States v. Holloway,* 290 F.3d 1331, 1337 (11th Cir. 2002). Plaintiffs allege there were no exigent circumstances present to support a warrantless seizure as the individual who made the call was already safe. However, the Eleventh Circuit has stated that "[t]he fact that no victims are found, or that the information ultimately proves to be false or inaccurate, does not render the police action any less lawful. . . . As long as the officers reasonably believe an emergency situation necessitates their warrantless search, whether through information provided by a 911 call or otherwise, such actions must be upheld as constitutional." *Id.* "The most urgent emergency situation excusing police compliance with the warrant requirement is, of course, the need to protect or preserve life." *Id.* at 1335 (citing *Mincey v. Arizona,* 437 U.S. 385, 392, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978)).

For the reasons previously stated in Part II.A.1.a., *supra,* exigent circumstances existed because it was reasonable for Defendants to believe that an armed suspect was inside the subject premises who posed a potential threat to those in the surrounding area or the officers. Accordingly, based on the facts alleged in

6. As stated above, consent may also justify a warrantless home seizure. However, as this case is before the Court on motions to dismiss, the Court concludes, for the purposes of this Order, that Defendants did not have consent to enter. The Complaint does not allege any express consent, and implied consent is insufficient. *See Bashir,* 445 F.3d at 1329.

the Complaint, Plaintiffs have not established that a constitutional right was violated.

2. Clearly Established

The Court also finds that Plaintiffs have failed to show the constitutional right was clearly established at the time of the incident. "The relevant dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz,* 533 U.S. 194, 202, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). There are two methods for determining whether the constitutional right was clearly established: (1) look to binding court decisions or (2) "ask whether the officer's conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to [the officer], notwithstanding the lack of fact-specific case law on point." *Moore v. Pederson,* 806 F.3d 1036, (11th Cir. 2015) (internal quotation and citation omitted). However, "[i]f case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." *Pickens v. Hollowell,* 59 F.3d 1203, 1206 (11th Cir. 1995) (quoting *Post v. City of Fort Lauderdale,* 7 F.3d 1552, 1557 (11th Cir. 1993).

Plaintiffs argue that the *Moore* decision—a case that "came down . . . nine days before the events at issue"—clearly established a constitutional violation in the case at hand. (Pl.'s Br. In Opp. To Pickens Sheriff's Office Defs.' Pre-Answer Mots. To Dismiss, Dkt. [22] at 14.) Plaintiffs

assert that the only distinction between *Moore* and the present case is that the seizure in *Moore* occurred while the plaintiff was inside his dwelling whereas Turner was outside. (*Id.)* However, the cases are factually different and "only factually specific analogous caselaw can clearly establish a constitutional violation." *Moore,* 806 F.3d at 1047. Unlike the case at hand where Defendants responded to a 911 call made in regard to violent threats, in *Moore,* the defendant responded to a neighbor complaint about an argument that "did not sound violent." *Id.* at 1040. Further, the plaintiff in *Moore* was not armed during the seizure, nor did anyone involved appear to be distressed. *Id.* Although Moore refused to provide identification when requested, he complied with the officer's instructions to turn around and put his hands behind his back. *Id.* By contrast, here, when the officers arrived at the premises, they were told Turner was armed, and when Turner appeared he was, in fact, visibly armed. Turner was also distressed and agitated, and he remained so during the seizure and refused to comply with the deputies' repeated requests to disarm.

While *Moore* clearly establishes that "an officer may not conduct a Terry-like stop in the home in the absence of exigent circumstances," *id.* at 1047, it is too dissimilar from the present case and, therefore, does not clearly establish a constitutional violation, *see* Part II.A.1.b., *supra.* Accordingly, Defendants' Motions to Dismiss as to Plaintiff's Section 1983 claims are **GRANTED**.

B. Failure to Train Claim Against Sheriff Craig

It is well settled in this Circuit that "supervisory officials are not liable under [Section] 1983 for the unconstitutional acts of their subordinates on the basis of respondeat superior or vicarious liability." *Keith v. Dekalb Cty.,* 749 F.3d 1034, 1047 (11th Cir. 2014) (quoting *Cottone v. Jenne,* 326 F.3d 1352, 1360 (11th Cir. 2003). There are no allegations that Sheriff Craig participated personally in the immediate events leading up to Turner's death, nor that he was present at the time in question. Rather, Plaintiffs base their Section1983 claim against Sheriff Craig on a failure to train the Pickens County Sheriff Deputies.[7]

To establish liability under Section 1983 based on the inadequacy of police training, a plaintiff must show that "the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Am. Fed'n of Labor & Cong. Of Indus. Orgs. v. City of Miami*, 637 F.3d 1178, 1188 (11th Cir. 2011) (quoting *City of Canton v. Harris*, 489 U.S. 378, 388, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989)) "Deliberate indifference can be established in two ways: by showing a widespread pattern of similar constitutional violations by untrained employees or by showing that the need for training was so obvious

7. At the outset, the Court notes that although Sheriff Craig had supervisory authority over the Pickens County Sheriff Deputies, because Plaintiffs have failed to state a Section 1983 claim against the Deputies, Plaintiffs' supervisory liability claim against Sheriff Craig also fails. Nonetheless, the Court proceeds to address Plaintiffs' claim on the merits.

that a . . . failure to train . . . employees would result in a constitutional violation." *Mingo v. City of Mobile*, 592 F. App'x 793, 799-800 (11th Cir. 2014), *cert denied*, 135 S. Ct. 2895, 192 L. Ed. 2d 926 (2015).

Here, the Complaint does not include sufficient facts about a history of abuse or widespread problems that would allow the Court to find that Sheriff Craig was put on notice regarding the need for more training. The Complaint contains only conclusory allegations about Sheriff Craig's failure to provide adequate training regarding "arrest procedures and the use of force." (Compl., Dkt. [1-1] ¶ 65.) Essentially, Plaintiff has simply stated a conclusion—that Defendants "failed to institute adequate policies and training to govern arrest procedures and the use of force, including the use of deadly force" — but has not provided sufficient facts from which the Court could draw that conclusion. Id. The Court cannot accept these unsupported allegations as a valid basis for a claim. See Oxford Asset Mgmt. v. Jaharis, 297 F.3d 1182, 1187-88 (11th Cir. 2002) (stating that "conclusory allegations, unwarranted deduction of facts[,] or legal conclusions masquerading as facts will not prevent dismissal"). Without a basis in specific facts, such assertions are not sufficient to show that the training was inadequate and that Sheriff Craig was on notice of any deficiency.[8] As a

8. Of course, there is an "obvious need to train [armed] police officers on the constitutional limitations on the use of deadly force." *Gold v. City of Miami,* 151 F.3d 1346, 1352 (11th Cir. 1998) (citing *City of Canton,* 489 U.S. at 390 n.10). But Plaintiff's Complaint still falls short. Mere notice of a need to train or supervise is not sufficient. Rather, a plaintiff must further establish that a final

result, the Complaint does not include facts from which the Court could conclude that Sheriff Craig has violated Section 1983 under a theory of inadequate training. Defendants' Motion to Dismiss as to Plaintiffs' failure to train claim is, therefore, **GRANTED**.

C. State Law Claims Against Pickens Sheriff's Office Defendants[9]

Defendants argue that Plaintiffs' state law claims against the Pickens Sheriff's Office Defendants are barred by official immunity. The state constitutional provision governing official immunity provides as follows:

> [A]ll officers or employees of the state or its departments and agencies may be subject to suit and may be liable for injuries and damages caused by the negligent performance of, or negligent failure to perform, their ministerial functions and may be liable for injuries and damages if they act with actual malice or with

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policymaker "made a deliberate choice not to take any action." *Id.* at 1350. The Complaint does not identify a specific decision made by Sheriff Craig resulting in a systemic failure to adequately train and supervise police officers.

9. Though not apparent from the face of the Complaint, Plaintiffs clarify in an opposition brief that they did not intend to assert any state law claims against the Georgia State Patrol Officers, Salcedo and Curtis. (Pls.' Br. In Opp. To The Georgia State Patrol Defs.' Pre-Answer Mots. To Dismiss, Dkt. [23] at 7.) Accordingly, this section pertains only to the individual Deputies of Pickens Sheriff's Office who responded to the incident.

> actual intent to cause injury in the performance of their official functions. Except as provided in this subparagraph, officers and employees of the state or its departments and agencies shall not be subject to suit or liability, and no judgment shall be entered against them, for the performance or nonperformance of their official functions.

Ga. Const. art. I, § 2, ¶ 9(d). The Supreme Court of Georgia has held that the term "official functions" refers to "any act performed within the officer's or employee's scope of authority, including both ministerial and discretionary acts." *Gilbert v. Richardson,* 264 Ga. 744, 452 S.E.2d 476, 483 (Ga. 1994). Accordingly, "[u]nder Georgia law, a public officer is not personally liable for a discretionary act unless the officer 'acted with actual malice or actual intent to cause injury.'" *Felio v. Hyatt,* 639 F. App'x. 604, 611 (11th Cir. 2016) (quoting *Valades v. Uslu,* 301 Ga. App. 885, 689 S.E.2d 338, 343 (Ga. Ct. App. 2009), *overruled on other grounds by Harrison v. McAfee,* 338 Ga. App. 393, 788 S.E.2d 872 (Ga. Ct. App. 2016)). As a threshold matter, the Court concludes that Defendants were acting within their discretionary authority during the events leading up to Turner's death. However, Plaintiffs have failed to show any actual malice or intent to injure on the part of Defendants under the applicable legal standards.

Both actual malice and actual intent to cause injury are demanding standards. *Felio,* 639 F. App'x at 611-12. "'[A]ctual malice' requires a deliberate intention to do wrong, and denotes express malice or malice in fact.

It does not include willful, wanton, or reckless conduct or implied malice. Thus, actual malice does not include conduct exhibiting a reckless disregard for human life." *Daley v. Clark,* 282 Ga. App. 235, 638 S.E.2d 376, 386 (Ga. Ct. App. 2006).

Defendants first argue that they enjoy official immunity for any negligence-based claim resulting from the performance of discretionary acts and reason that since a claim for wrongful death is based in negligence (as opposed to malice), Defendants are necessarily entitled to official immunity. *See Hoyt v. Cooks,* 672 F.3d 972, 981 (11th Cir. 2012). It is not so simple, however. Even in a claim like wrongful death, the Supreme Court of Georgia has stated that if an officer acts solely with actual intent to cause injury—that is, firing "intentionally and without justification"—then he or she would not be protected by official immunity. *Kidd v. Coates,* 271 Ga. 33, 518 S.E.2d 124, 125 (Ga. 1999); *see also Filio,* 639 F. App'x at 612.

Nonetheless, the Court agrees with Defendants that Plaintiffs have not alleged that Defendants' actions were performed "with actual malice or with actual intent to cause injury." Ga. Const. of 1983, Art. I, Sec. II, Par. IX(d). While Plaintiffs assert Defendants' acts were intentional and without justification (Compl., Dkt. [1] ¶ 69), actual intent to cause injury requires more than merely the "intent to do the act purportedly resulting in the claimed injury. This definition of intent contains aspects of malice, perhaps a wicked or evil motive." *Felio,* 639 F. App'x at 611.

The Complaint alleges that Defendants encountered Plaintiff after responding to a 911 call regarding a threat of bodily harm. (Compl., Dkt. [1] ¶ 22.) When Defendants arrived, Turner was armed and refused to comply with the deputies' multiple requests to disarm. (*Id.* ¶ 29, 30, 32.) When Turner, still armed, made his way towards an unarmed officer, a deputy fired beanbag rounds to which Turner responded by firing his pistol. (*Id.* ¶ 42-43.) Only then did Defendants apply deadly force by returning fire. (*Id.* ¶ 44.). The only inference to "malice" in the Complaint is a threadbare characterization of Defendants' conduct as "unlawful intentional acts." (*Id.* ¶ 69.) This conclusory allegation is insufficient to establish malice, and the mere intent to return fire is not enough. As a result, the Complaint does not allege any malice or intent to injure. Defendants are, therefore, entitled to official immunity; Defendants' Motion to Dismiss as to Plaintiffs' state law wrongful death claim is **GRANTED**.

D. Attorney's Fees

As none of the Plaintiffs' substantive causes of action remain in this litigation, Defendants' Motions to Dismiss as to Plaintiff's claim for attorney's fees are **GRANTED**.

CONCLUSION

For the foregoing reasons, Defendants' Motions to Dismiss Plaintiffs' Complaint [7, 21] are **GRANTED**. Plaintiffs' Complaint is **DISMISSED**. The Clerk is **DIRECTED** to close the case.

SO ORDERED, this 27th day of September, 2018.

/s/ Richard W. Story
RICHARD W. STORY
United States District Judge

APPENDIX E — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JULY 14, 2023

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-10600

JANET TURNER O'KELLEY, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN HARLEY TURNER, JOHN ALLEN TURNER,

Plaintiffs-Appellants,

versus

SGT. TRAVIS PALMER CURRAN, A.K.A. TRAVIS LEE PALMER, DEP. FRANK GARY HOLLOWAY, DEP. KEELIE KERGER, DEP. BILL HIGDON, DEP. TODD MUSGRAVE,

Defendants-Appellees,

OFC. JONATHAN SALCEDO, *et al.*,

Defendants.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 2:17-cv-00215-RWS

Appendix E

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before ROSENBAUM AND LAGOA, Circuit Judges, and Wetherell,* District Judge.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. FRAP 35, IOP 2.

* Honorable T. Kent Wetherell, II, United States District Judge, for the Northern District of Florida, sitting by designation.

APPENDIX F — ORDER DENYING PETITION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED OCTOBER 28, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-14512-EE

JANET TURNER O'KELLEY, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN HARLEY TURNER, JOHN ALLEN TURNER,

Plaintiffs-Appellants,

versus

SHERIFF DONALD E. CRAIG, SGT. TRAVIS PALMER CURRAN, A.K.A. TRAVIS LEE PALMER, DEP. FRANK GARY HOLLOWAY, DEP. KEELIE KERGER, DEP. BILL HIGDON, DEP TODD MUSGRAVE, *et, al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Appendix F

BEFORE: MARCUS, JORDAN, and ROSENBAUM Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ENTERED FOR THE COURT:

/s/_____
UNITED STATES CIRCUIT JUDGE

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