No.: 24-6315

ORIGINAL

IN THE SUPREME COURT

OF THE UNITED STATES

FILED
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SUPREME COURT, U.S.

Eric St. George,

PETITIONER

V.

The City of Lakewood Colorado, et al.,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE TENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Q: In the grant of Qualified Immunity, the Tenth Circuit applied the 2017 vacatur of Pauly I by White v. Pauly, 580 U.S. @ 78 to the 2016 shooting of Mr. St. George by Lakewood Police. On July 31, 2016 "...at the time of the violation..." Pauly I was clearly established law. On January 9, 2017, Pauly I was no longer clearly established law. Is this a permissible violation of Tolan v. Cotton, 572 U.S. 650, 656 (2014)?

Q: In the grant of Qualified Immunity, the Tenth Circuit determined the disputed fact — a cellphone call and blocked Caller ID by police, without more, is an acceptable stand-in for knock-and-announce — in the light most favorable to moving party Lakewood PD. Is this a permissible violation of Tolan v. Cotton, 512 U.S. 650, 657 (2014) and Wilson v. Arkansas, 514 U.S. 937, 931, 934 (1995)?

Q: In the shooting of Mr. St. George, the Lakewood Police actors held the subjective belief that he was "coming out for a fight" and engaged in what they believed to be Mutual Combat with him. By failing to give any warning — indeed no officer ever shouted any identification, command, or warning prior to shooting him — this conduct permits both parties to be wrong-doers. Because the LPD Defendants could be found as wrong-doers by engaging in Mutual Combat, and Mr. St. George's conviction could be permitted to stand in such a scenario, are Mr. St. George's claims against LPD barred by Heck v. Humphrey? Is deliberate, reckless conduct that precedes mutual combat as a standalone fourth amendment violation?

LIST OF PARTIES

[X] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows: The City of Lakewood Colorado; Devon Trimmer, AKA Devon Meyers; Jason Maines; Jeff Larson; and Dan McCasky (RESPONDENTS) Eric St. George (PETITIONER)

RELATED CASES

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Wilson v. Arkansas, 514 U.S. 937 (1995) ..... ii, 16

TABLE OF OTHER AUTHORITIES

MEDIA

Edwards, et al., "Risk of being killed by police use of force in the United States by age, race-ethnicity, and sex." Proceedings of the National Academy of Sciences. August 2019 116(34):16793-16798. 24

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APPENDIX E: 20-1259 St. George v. City of Lakewood, et al., Opinion of the Tenth Circuit Court of Appeals, 20 August 2021. [2021 U.S.App.LEXIS 24934]

APPENDIX F: 18-cv-01930-WJM-STV St. George v. City of Lakewood, et al., "OBJECTION TO DEFENDANTS' MOTION TO DISMISS" 12 April 2022. Filed as DOC 161 as response to the Defendants' Motion to Dismiss the Fifth Amended Complaint

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is reported at Eric St. George v. City of Lakewood, 2024 U.S.App.LEXIS 19757

The opinion of the United States district court appears at Appendix B to the petition and is reported at Eric St. George v. City of Lakewood, 2022 U.S.Dist.LEXIS 170903

The Recommendation of the United States Magistrate Judge appears at Appendix C to the petition and is reported at Eric St. George v. City of Lakewood, 2022 U.S.Dist.LEXIS 171481

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was 7 August 2024.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 15 October 2024, and a copy of the order denying rehearing appears at Appendix D.

The jurisdiction of this Court is invoked under 28 USC §1254(1).

This petition is timely filed on or before 13 January 2025

Sup. Ct. R. 13(3)

INTRODUCTION

Policing is a matter of the highest public interest. It is so important that it touches off international activism when it goes awry. Police power of state is an authority held in public trust. That trust is eroded when police power is abused. That trust is eroded when police fail to use their power in the interests of public safety. The doctrine of Qualified Immunity was created for the purpose of providing breathing room for law enforcement to act, all while ensuring that illicit conduct is held to account.

This petition involves the grant of qualified immunity to the Defendents, Lakewood Colorado Police officers, that engaged in an ambush and shooting of the Plaintiff, Eric St. George, while he was in the curtilige of his home. The Colorado District & Tenth Circuit, have viewed the facts of the case in a light most favorable to the Defendants on a Motion to Dismiss. The analysis of the second prong of QI: was the right clearly established?, has been performed using law that was announced five months after the ambush. The Panel found that Heck bars this case, failing to recognize that Mr. St. George's claims are distinct from his underlying conviction, and ignored fully the theory that LPD engaged in mutual combat with Mr. St. George.

This Court must issue the Writ of Certiorari in order to review this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

SECOND AMENDMENT: "...the right of the people to keep and bear Arms, shall not be infringed."

FOURTH AMENDMENT: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..."

SEVENTH AMENDMENT: "...the right of trial by jury shall be preserved..."

FOURTEENTH AMENDMENT: "...nor shall any State deprive any person of life, liberty, or property, without due process of law..."

STATEMENT OF THE CASE

The basis of this case is rooted in an excessive use of force event. The Lakewood Colorado police shot the Plaintiff Eric St. George. Mr. St. George brought suit via 42 USC Sec. 1983. He incorporates by reference the facts of the case in the record here as set forth in his Fifth Amended Complaint, the related pleadings, and as summarized by the Tenth Circuit Court of Appeals in their August 20, 2021 reversal-of-dismissal Opinion, St. George v. City of Lakewood, 2021 U.S.App.LEXIS 24934 *3-10. Appendix E

The most salient facts of the encounter as pertains to this action are: 1) Lakewood PD (LPD) officers responded to Mr. St. George's home on the night of July 31, 2016 2) based upon a report made by an "escort." The report was found by a jury to be incredible, 3) the false allegations were charged as attempted murder, menacing, and illicit sexual contact. 4) Mr. St. George was acquitted of that attempted murder. He maintains his innocence as to the convictions. 5) The LPD arrived at 10:13 PM, hid their vehicles and surreptitiously approached Mr. St. George's home. 6) Mr. St. George returned home at 11:15 PM; no officer made contact with him upon his arrival. 7) No LPD officer ever knocked at the front door (or rang a door bell, etc.) No LPD officer ever announced his/her presence being in the curtilige of the home. 8) LPD officers made six calls from cell-phones to Mr. St. George. The Caller ID was blocked on every occasion. 9) Three of the calls go unanswered to voicemail, three are answered by Mr. St. George, in turns. 10) LPD officers tell Mr. St. George by phone that they are police and that they are outside. 11) LPD officers tell Mr. St. George by phone they see him through backyard windows.

12) The windows are fully opened; blinds, curtains and sashes. It is July. 13) Mr. St. George cannot see police from the front door, LPD are hiding, lying in wait to ambush him. 14) Mr. St. George exits his back door. There are no signs of police. LPD are hiding, lying in wait to ambush him. He stands on his patio for one minute and 22 seconds. Mr. St. George is not armed. 15) Police do not identify themselves — they do not shout, alert, or reveal themselves. 16) At 12:38 AM, Mr. St. George exits a third time. He has armed himself with a shotgun. 17) Police knew that Mr. St. George was "upset," "unsettled," and "paranoid." Above all he did not believe that the calls were placed by police. Every officer's statement and trial testimony confessed this was known. 18) Two-and-a-half hours had elapsed since LPD arrived to Mr. St. George. Nothing unfolded quickly to prevent LPD from shouting identification and presence and to prevent a confrontation. 19) Mr. St. George charged his shotgun. The sound of the gun racking was loud over the silence of night. 20) LPD made a decision not to shout, not to identify, not to issue any warning. LPD chose not to call the cellphone again. 21) After five minutes and 43 seconds, Mr. St. George began to walk the perimeter of his home, shotgun in hand at the low-ready. 22) He walked along the back (north) side of the home, around a corner, and mid-way along the east side of the home, where LPD officer Devon Trimmer hid behind a truck. She opened fire on Mr. St. George without a word. 23) Mr. St. George was shot in his legs. He bled. He returned fire. 24) Mr. St. George and Agent Trimmer exchanged additional gunfire as he retreated from her. 25) Never once did LPD shout any warning, most relevantly "Police!" or other ID. 26) LPD officer Jason Maines aimed

a gun from his hidden position behind a brushy tree at a retreating Mr. St. George. No shouts. No ID. 27) Mr. St. George fired at that threat. 28) Mr. St. George crawled hands-and-knees into his back door. The entire firefight elapsed in 90 seconds. 29) Mr. St. George called 911 to report the gunfight and obtain medical help. The dispatcher did not identify the assailants outside as LPD officers. 30) 16 minutes later, bleeding, Mr. St. George crawled to his front door, he fired his pistol four times as warning to any would-be attacker. 31) Mr. St. George opened his front door. Police officers **shouted** "Police!" and "Hands!" to which he responded immediately and appropriately.

Mr. St. George was charged with crimes resultant from the Lakewood Police ambush. He was acquitted of charges of first-degree attempted murder. The jury compromised on lesser-included second-degree attempted murders, menacing, and assault. He maintains his innocence based on self-defense.

42 USC Sec. 1983 Mr. St. George filed his claims for, inter alia, use of excessive force against the City of Lakewood and its individual officers. On 20 August 2021, 20-1259, a panel of the Tenth Circuit Court of Appeals reversed dismissal of the suit by the District of Colorado. The panel majority found that Mr. St. George had plausibly pled facts that the Defendants had violated Mr. St. George's right to be free from unreasonable use of force, amid other claims. [St. George, supra]

On remand, the Defendants filed a motion to dismiss alleging that while Mr. St. George had cleared the first prong of the Qualified Immunity inquiry, conceding that the constitutional violation had

occurred, that the right had not been clearly established. In addition, the motion argued the claims were barred by Heck.

In the District Court Mr. St. George argued that on 31 July 2016, that Pauly I, 814 F.3d 1060 (10th Cir. 2016) was controlling law that clearly established that the LPD's conduct was a violation of the Fourth Amendment. He argued that the Heck defense had been abandoned by failure to raise it in the 20-1259 appeal. He argued that the Heck defense did not apply because, as contemplated in Havens, 783 F.3d @ 778, it was the officers' own reckless and deliberate conduct that had unreasonably created a perceived need to use force against Mr. St. George. He argued that the LPD officers engaged in Mutual Combat with him; or at least the officers subjectively believed that they were electing to engage in a mutual combat. Mr. St. George made these arguments before the District Court's Magistrate Varholak in Document number 161, filed on 12 April 2022 as a response to the Motion to Dismiss and titled "OBJECTION TO DEFENDANTS' MOTION TO DISMISS." Again before Judge Martínez in his Objection to the Magistrate's Recommendation, which was Document number 171. See 2022 U.S.Dist.LEXIS 171481. Mr. St. George's Objection, DOC 179, was stricken, and an Amended Objection filed as DOC 186 was also stricken. The Recommendation was accepted, Qualified Immunity was granted to the LPD on grounds that; no case clearly established that Mr. St. George had a right to be free from excessive use of force, Pauly I was distinguishable, and the case was barred by Heck. The case was closed.

ON APPEAL TO THE TENTH CIRCUIT, 22-1333, Mr. St. George argued he was entitled to an exception to the firm waiver rule. He argued that his case was indistinguishable from the facts of Pauly I — it was a case on-point. He argued that Pauly I was clearly established law on 31 July 2016. He argued that Heck did not apply because; it had been waived in the prior appeal, LPD's reckless, deliberate conduct created a perceived need to use force as in Havens, and that the LPD officers engaged in what they believed to be mutual combat.

In their Opinion, the Panel found that Mr. St. George was entitled to an exception to the firm waiver rule. The Panel found that Heck barred Mr. St. George's claims because they read his argument to say he'd done "nothing wrong." The Panel ignored Mr. St. George's Mutual Combat argument. The Panel found that Pauly I could not have clearly established Mr. St. George's right to be free from excessive force — 1) Pauly I was vacated by White v. Pauly, and 2) Pauly I was distinguishable from Mr. St. George's case. The Panel wrote that the cases were distinguishable for four reasons: i) The Pauly officers were investigating a road rage incident, not the discharge of two gunshots and sexual contact, ii) The Pauly officers did not identify themselves, the LPD <u>did</u> identify themselves, iii) Officer White shot Samuel Pauly from a protected position, and Samuel was not advancing. LPD's agent Trimmer was behind a truck, and Mr. St. George was "advancing toward her." iv) Samuel Pauly was killed, Mr. St. George was shot in his legs, "which might indicate an intent to wound and mitigate the threat, not to kill."

In a pair of footnotes, the Panel wrote that Mr. St. George "raises a **<u>new</u>** argument that Trimmer and Maines engaged in Mutual

Combat," and "St. George **now** denies that the officers identified themselves." (**emphasis** mine) The implications were that Mr. St. George had not raised the matter of Mutual Combat nor the matter of LPD's failure to identify themselves in the District Court below. This is false.

That Pauly I had been announced on February 9 of 2016, and that White v. Pauly was announced on January 9 of 2017 is an issue that was fully briefed below. These facts were settled as part of the Magistrate Varholak's Recommendation. [Supra, at *34 n.13]

> He wrote: "Pauly I was issued February 9, 2016. 814 F.3d 1060. The incident at the center of the instant case occurred on July 31/August 1 2016. On January 9, 2017, the Supreme Court vacated Pauly I, holding that 'on the record described by the Court of Appeals, [the defendant officer] did not violate clearly established law.' White v. Pauly, 137 S.Ct. @ 552." 2022 U.S.Dist.LEXIS 171481 *34 n.13

Pauly I was clearly established law beginning on 9 FEB 2016 until 9 JAN 2017. The incident that makes up the basis for Mr. St. George's claims against these Defendants occurred on 31 July 2016. This was during the Pauly I clearly-established interval.

Mr. St. George had argued that Lakewood Police believed themselves engaged in Mutual Combat based on facts presented in the Complaint, and all subsequent complaints to include the Fifth Amended Complaint. In his DOC 161, a Response to the Defendants' Motion to Dismiss the Fifth Amended Complaint, Mr. St. George had written:

> "The Defendants try to create in their motion a false dichotomy that excessive force claims between Lakewood Police and the public are an either-or proposition. It is a logical fallacy: Either the police are the victims or the citizen is a victim. Reality is excessive force is an either-or-both-neither proposition. The same set of premises as in **'mutual combat'** underpins the idea that even while a man may be convicted of an assault against

> an officer, the reckless and/or deliberate conduct of those officers fomented the circumstances surrounding that incident. A reasonable jury could find that Trimmer's conduct of lying-in-wait without any ID or warning was active conduct of tacit acquiescene to what she believed to be mutual combat. In her own statement, Trimmer tells us that her belief in the moments before shooting St. George was, "I think he's hunting me, that's how I take it... he had ammo in his pocket, he was coming out for a fight." She didn't have this belief earlier, before St. George armed himself, a situation that her silence recklessly or deliberately created. While this belief was untrue, Trimmer tells us that she believed it at the time and yet she never shouted out any ID or warning. She had plenty of time. These facts are suggestive of a willing, voluntary, mutual combat on Trimmer's part if she genuinely believed what she reported. This is precisely the reason why failure to give a warning is deemed so important as to often be dispositive; the failure to warn (as de-escalation), has all the markers of an implied agreement to mutual combat. See United States v. Mayberry, 567 Fed.Appx 643 (10th Cir. 2014), Harrison v. Marshall, 2010 U.S.Dist.LEXIS 136943 *3, Salas v. Faulk, 2016 U.S.Dist.LEXIS 185507. We cannot forget, these defendants arrived at St. George's home, he didn't seek them out. They called him out of his house in the middle of the night. They intended to use force on him well before they'd even called him out (to 'grab' him,) and did nothing to de-escalate the situation they created by not ID-ing or warning after they believed (incorrectly) St. George was looking for a fight. Instead, they discussed crossfire issues, and drew their weapons, in preparation for a fight." 18-cv-01930 D. Colo. DOC 161, page 8. See Appendix F, attached.

The holdings from Pauly I upon which the denial of QI was made by the Tenth Circuit in that case were: (1) disputed facts remained as to whether police adequately identified themselves, necessitating denial of QI, (2) reasonable officers should have known their conduct would cause the Paulys to defend their home, and (3) the officers failed to warn where it was feasible before using force. Mr. St. George relied on these Pauly I holdings before the Panel on appeal, along with the arguments that Heck did not apply to his case, because the LPD were deliberate and reckless, and that they'd engaged in

mutual combat.

In the 22-1333 appeal, Mr. St. George had further argued that because the prior 20-1259 appellate panel had positively identified that a violation of Mr. St. George's rights had occurred as pled, his case must proceed to trial. The only consideration remaining was whether it had been clearly established on the particular facts to be a violation, the "second prong" of the analysis. Officers can be granted Qualified Immunity; Municipalities cannot. This left the Monell claim against the City of Lakewood viable to proceed. For judicial efficiency, the District Court should have retained supplemental jurisdiction over the State claims and heard them alongside the federal claim(s).

REASONS FOR GRANTING THE WRIT

When performing a Qualified Immunity inquiry this Court has held that the alleged violation must be analyzed using clearly established law at the time of the incident. Law enforcement cannot be expected to anticipate changes in the law before they happen. Throughout the course of his suit, Mr. St. George has relied on Pauly v. White (Pauly I), 814 F.3d 1060 (10th Cir. 2016). Pauly I was clearly established law beginning on February 9, 2016. The facts of the case in Pauly I are well known to this Court. The facts of Mr. St. George's case are as above and as provided in the record.

The Tenth Circuit Opinion misapprehends the law of this Court for analyses of Qualified Immunity. The Opinion reads, "As an initial matter, the obvious problem with Pauly is that it was vacated by the Supreme Court, which ruled that White did not violate clearly established law." St. George, 2024 U.S.App.LEXIS 19757, *16 To consider this Court's vacatur of Pauly I in White v. Pauly (Pauly II), 580 U.S. 73 (2017), the Tenth Circuit applied Pauly II retroactively to the Lakewood Police ambush of Mr. St. George. This ignores the command of this Court to analyze "whether the right in question was 'clearly established' at the time of the violation." [Tolan v. Cotton, 572 U.S. 650, 656 (2014), citing Hope v. Pelzer, 536 U.S. 730, 739 (2002)]

"'[T]he salient question... is whether the state of the law' at the time of an incident provided 'fair warning' to the defendants 'that their alleged [conduct] was unconstitutional,'" [Tolan, 572 U.S. @ 656, citing Hope, 536 U.S. @ 741] This Court reversed the Tenth Circuit for applying clearly established law ex post facto in

City of Tahlequah v. Bond, 595 U.S. 9, 13 (2021). In that case, this Court wrote, "Estate of Ceballos, decided after the shooting at issue, is of no use in the clearly established inquiry." Id., citing Brosseau v. Haugen, 543 U.S. 194, 200 n.4 (2004)(per curiam)

Pauly I was the clearly established law at the time of the LPD ambush, and the Qualified Immunity analysis needed to apply Pauly I to the facts of Mr. St. George's case. Pauly II, decided after the LPD shooting of Mr. St. George is of no use in the Qualified Immunity inquiry. To the extent that the Tenth Circuit weighed Pauly II, its Opinion must be reversed with instructions to perform an analysis using the clearly established law that was contemporary to when LPD ambushed and shot Mr. St. George. Pauly II was decided five months afterward and has no bearing on the Qualified Immunity inquiry.

THE TENTH CIRCUIT DREW INFERENCES IN FAVOR OF LPD'S DEFENDANTS TO DIFFERENTIATE PAULY I AND GRANT QI

The Tenth Circuit panel from the first appeal of dismissal of Mr. St. George's case, 20-1259, considered the facts from Pauly I and compared them to the facts of Mr. St. George's case. Both cases involved: 1) police officers arrival under cover of night to answer unverified reports of crimes without warrant. Both reports implied the subjects may be intoxicated. Both reports were likely acts of SWATTING, 2) police vehicles were hidden from view of the subjects, 3) police approached the homes surreptitiously, 4) police surround homes without knocking-and-announcing, 5) police officers fail to identify themselves sufficiently, 6) plaintiffs arm themselves in defense of self and home against unannounced intruders, actually police, 7) police officers search into open windows of the homes

from the curtilige and see the occupants, 8) the plaintiffs use their weapons to warn away intruders — Daniel Pauly discharges a shotgun into the air twice, Mr. St. George charges his shotgun by racking the action, 9) police are in covered positions, 10) police choose not to shout any warnings of use of force when it was feasible to do so, 11) plaintiffs in both cases are shot and mortally wounded without warning — Samuel fatally so; Mr. St. George survived.

These two cases are eerily similar. Any denial that Pauly I is on-point is to willfully misconstrue the facts. The few differences are immaterial to the analysis.

i. The Tenth Circuit wrote that police were investigating a potential misdemeanor at the Pauly home and a potential felony at Mr. St. George's home. Even if true, this does not move the calculus enough to stand alone as a case-differentiating fact. There was no material difference between the situations that either set of police encountered. There were no active shooters or exigent circumstances — only men in their own homes. No officer had a warrant or probable cause. A panel should acknowledge that had Samuel survived the encounter, the Paulys would likely have been charged with felonies (e.g. menacing, assault, etc.) as a means to legitimize the New Mexico Police response and mitigate their liability.

ii. The Tenth Circuit panel Opinion states that the officers in Pauly I did not identify themselves, in contrast Lakewood Police did identify themselves to Mr. St. George. This does not stand up to scrutiny. In Pauly I, the record reflects that the officers had flashlights, shouted out "State Police!" at least once, and could

be seen in silhouette while approaching the home shouting other things (e.g. "We're coming in!") Lakewood Police called on a cell-phone and deliberately blocked the Caller ID — literally denying "identification" to Mr. St. George. Sgt. Muller testified that Mr. St. George "did not believe" he was police. And why would he have believed it? When he exited his home on three occasions, the LPD hid themselves and never spoke a word to Mr. St. George.

The Pauly panel found that a genuine dispute existed as to whether officers had sufficiently identified themselves. A reasonable jury could find that LPD had failed to identify themselves to Mr. St. George. The 20-1259 10th Cir panel was very concerned with the insufficient identification. "...officers hid from view and failed to identify themselves," was echoed in that Oral Argument, Opinion, and in media accounts of the ambush and shooting. The matter of proper identification is one not to be determined by judges at the Qualified Immunity stage in a light most favorable to the Defendants when it is in dispute.

In performing their analysis of clearly established law, the Tenth Circuit has drawn inferences unreasonably in a light most favorable to the Defendants, a clear violation of Tolan, 572 U.S. @ 651. (The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.) Sufficiency of the cell-phone blocked-Caller-ID identification is disputed. The Sgt. Muller testimony evidence that Mr. St. George did not believe he was a police officer demonstrated that the LPD identification was incredible and insufficient. To draw a contrary inference against Mr. St.

George in a light favorable to the movant Defendants violates the clearly established law in Tolan. The law has been unreasonably applied as to the issue of identification, a violation of the law of this Court that demands a reversal and remand to the lower court.

iii. The Opinion imputes difference in White's form of cover behind a rock wall versus Agent Trimmer's cover around the corner of a building and behind a pickup truck. The Panel alleges that Mr. St. George was "advancing" on Agt. Trimmer. A reasonable jury could not find that Mr. St. George was "advancing" on anyone... nobody had ever announced their presence. Agent Trimmer was hiding, as all four LPD officers were hiding themselves. They were all hiding over the course of three hours while surrounding Mr. St. George's home. White and Trimmer were in positions equally impenetrable at the time that a shouted warning of potential force needed to be given. It was Agt. Trimmer's choice not to shout a warning that allowed Mr. St. George to approach where she had hidden herself behind a truck.

It was an unreasonable determination of the facts to allege that Mr. St. George was "advancing" on anyone. On the subject of warning, the Court has been very clear and unwavering, "...deadly force may be used if necessary... if, where feasible, some warning has been given." Tennesse v. Garner, 471 U.S. 1, 11-12 (1985); Graham v. Connor, 490 U.S. 386, 394-96 (1989); Pauly II, 580 U.S. 73, 78 (2017). No warning was ever shouted; there was no "advancing."

The Tenth Circuit has held that police officers "...need not await the glint of steel before taking self-protective actions," [St. George, 2021 U.S.App.LEXIS 24934 *18, citing Larsen, 511 F.3d

@ 1260] and the converse is also true. An officer cannot passively wait for the 'glint of steel' and then use that glint as her cause to shoot her way out of the situation that she has created. Agt. Trimmer had a positive obligation to avoid the 'glint of steel' by shouting out a warning because it was feasible. Her co-Defendant Sgt. Maines had an equal obligation to shout out a warning before Agt. Trimmer opened fire; it was feasible for him to do so.

The Tenth Circuit has made clear that mere possession of a fire-arm at the low-ready position is not equal to making hostile motions.

Here, this Panel has drawn inferences in a light most favorable to Defendant Trimmer as to her cover, her choice not to issue any warning, and to allege that Mr. St. George could "advance" on her when she was hidden from sight and had never announced her presence. Trimmer was contemporaneously aware that Mr. St. George did not know who she was or where she was hiding. Drawing these inferences in favor of the Defendants at the Motion to Dismiss phase — well before Summary Judgment — the Tenth Circuit Opinion violates Supreme Court precident. (Tolan, supra, et al.)

(iv.) The fourth difference found by the Panel Opinion is the most unreasonable. Judge Federico wrote: "Trimmer shot St. George in the leg, which might indicate an intent to wound and mitigate the threat, not to kill." If the Panel weighed this inference in favor of Trimmer — as the Opinion states that it did — it is an egregious violation of clearly established law that demands reversal of the grant of QI. In Pauly I, the Tenth Circuit cite to a City of Lake-wood case to define deadly force. "Deadly force is 'force that the actor uses with the purpose of causing or that he knows to create

a substantial risk of causing death or serious bodily harm.' Purposefully firing a firearm in the direction of another person... constitutes deadly force." [Pauly I, 814 F.3d @ 1070 n.4 quoting Jiron v. City of Lakewood, 392 F.3d 410 (10th Cir. 2007)] Devon Trimmer shot Eric St. George with intent to kill him. That he was not killed like Samuel Pauly does not make him fortunate, nor does it make these cases differentiable.

If we were to give the reversal of Pauly I by Pauly II weight in this analysis: We'd read the Moritz dissent in Pauly I, the en banc discussion in Pauly v. White, 817 F.3d 715 (10th Cir. Apr. 11, 2016), the Ginsberg concurrence, and the panel opinion. An objectively reasonable panel would have to find that these LPD defendants still must be denied Qualified Immunity.

The Moritz dissent was primarily concerned with the fact that Officer White arrived to the Paulys' home after Truesdale and Mariscal and late-to-the-scene White's split-second decision to shoot Samuel was entitled to immunity. This dissent became the seed of this Court's vacatur in Pauly II.

Agent Trimmer did not arrive late like White. By contrast, she was the first to arrive. Agt. Trimmer did not take cover behind a rock wall because she heard someone shouting "We've got guns!" and fire shotgun blasts. She watched Mr. St. George step outside unarmed, ostensibly to talk to her. She watched him stand in the wide open for one minute and 22 seconds. She chose not to speak to him. She chose to hide. After he armed himself subesequent, she slipped around the corner of a building and hid behind a truck and waited to ambush while she had the drop on him. She never needed to act split-

second, she'd been plotting to ambush Mr. St. George — for hours! Three. Agent Trimmer's conduct was the same as Mariscal, Truesdale and White, combined. Agent Trimmer was more culpable than the New Mexico Police in the Pauly incident.

The Justice Ginsberg concurrence in Pauly II is short. She was troubled by the lack of any order to drop the weapon being made to Samuel. She also recognized the inadequacy of the police identification. She wrote, "As to Officer White, the Court, as I comprehend its opinion, leaves open the propriety of denying summary judgment based on fact disputes over when Officer White arrived on the scene, what he may have witnessed, and whether he had adequate time to identify himself and order Samuel Pauly to drop his weapon before Officer White shot Pauly." Pauly II, 580 US @ 81

The upshot of Pauly II is that had White arrived at the same time as Mariscal and Truesdale, he would have been denied Qualified Immunity. Indeed, White's "...failure to shout a warning..." would have "...constituted a run-of-the-mill Fourth Amendment violation." Id. @ 80. For the purposes of this inquiry, the Tenth Circuit should have taken the LPD's blocked-Caller-ID cellphone calls and set them equal to Truesdale and Mariscal's "State Police!" and "Come out or we're coming in!" They were all inadequate and did not effect a constitutionally sufficient knock-and-announce. Neither universe of facts contained any warning when warning was required and feasible. The instant case is particularized on the facts of Pauly I. Pauly I is on-point, it was clearly established law at the time. Mr. St. George does not rest on an overgeneralized set of the facts. The

dismissal must be vacated, this case remanded, and instruction given to deny Qualified Immunity to the Defendants.

A MUTUAL COMBAT THEORY OF THE CASE OVERCOMES THE HECK BAR

The Panel ignored Mr. St. George's argument that it was possible for his case to move forward on a theory of mutual combat. This theory is well rooted in the facts of the case as outlined in the Fourth Amended Complaint and Fifth Amended Complaint. This theory was preserved in the response to the Motion to Dismiss the Fifth Amended Complaint, Document 161, before District Court Magistrate Varholak. These facts are well timelined above.

Heck v. Humphrey, 512 U.S. 477 (1994) stands for the proposition that a plaintiff cannot succeed on a civil claim that calls into question his criminal conviction, and therefore his claim is barred until such time as he receives a favorable termination of his convictions. In practice, courts have treated Heck as meaning that so long as police can foist a conviction on their victims of excessive force, they can avoid the liability.

Mr. St. George raised the argument that because the conduct of the Lakewood Police — illicit search from the curtilige of the home, failure to knock-and-announce, failure to identify themselves, failure to shout a warning before using force — was deliberate and reckless, the use of force was objectively unreasonable and thereby excessive. This theory mirrored that which was found in Havens v. Johnson, 783 F.3d 776, 778 (10th Cir. 2015). This "reckless creation" theory of violation remains controlling Tenth Circuit precedent even while there is a split among the circuits, and this Court has

explicitly left it undisturbed in 2021, which was post-Mendez (581 U.S. 420 (2017)). See Bond, 595 U.S. @ 13 (2021)

This LPD conduct has been alleged in every iteration of the Complaint in this case, and supports a theory of Mutual Combat. (The exerpt from DOC 161 as above on page 10 of this petition is incorporated by reference as though set forth in full here.)

The Panel was objectively unreasonable in finding that Mr. St. George raised mutual combat as a **NEW** argument on appeal and had failed to preserve it below. He had preserved the issue for appeal when he raised mutual combat in his response — titled "Objection" due to pro-se naivete — OBJECTION TO DEFENDANTS' MOTION TO DISMISS — and sought the court to make a ruling upon it. See: Somerlott v. Cherokee Nation Dist., Inc., 686 F.3d 1144, 1150 (10th Cir. 2012) ("An issue is preserved for appeal if a party alerts the district court to the issue and seeks a ruling."); Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 174 (1988) ("...make known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor.") A generalized authority cited in multiple contexts regarding preservation of issues for appeal. Cf. Dandridge v. Williams, 397 U.S. 471, 475 n.6 (1970) ("It is likewise settled that the appellee may... urge in support of a decree any matter appearing in the record... [as] insistence upon [a] matter overlooked or ignored by [the lower court].")

A mutual combat theory allows Mr. St. George to prosecute his claims by permitting his conviction to stand while simultaneously finding culpability in these Defendants. This theory of the case

benefits the whole of Fourth Amendment litigation as a stanch to the blood of police-violence victims that are prosecuted as a means to bar their legitimate claims. The unintended consequence of over-liberal granting of Heck bars is to invite further police violence obscured from the public and compounded through prosecute-the-victim weaponization of the criminal justice system.

The mutual combat theory of this case was presented in the District Court below, preserved for appellate review, and ignored by the Tenth Circuit. This was a violation of Supreme Court precident that requires a remand to the Tenth Circuit with instruction to permit the case to proceed to trial.

THE LAKEWOOD POLICE ARE ROUTINE USE-OF-FORCE OFFENDERS

Mr. St. George has advised both the District of Colorado and the Tenth Circuit that according to the Proceedings of the National Academy of Sciences that Colorado ranks 3rd in the nation for per capita fatalities by police shooting. Four of the top seven states are within the Tenth Circuit, and Wyoming suppresses its data. See Edwards, et al. "Risk of being killed by police use of force in the United States by age, race–ethnicity, and sex." PNAS Aug. 2019, 116(34):16793-16798.

The Lakewood Police are overzealous, hyperaggressive and retaliatory in their culture. Even were genuinely well-meaning officers to exist at LPD, the shoot-first-ask-questions-later custom and training have overborne the will to conduct themselves in a constitutional manner. The LPD labor union resisted implementation of body-worn cameras until state law mandated it in the Enhance Law

Enforcement Integrity Act, Colo. Senate Bill 2020-217, CRS Sec. 24-31-902. Body-worn cameras have been empirically proven to increase public safety. [Task Force on 21st Century Policing.]

The Lakewood Police senselessly slaughtered one of their own officers in a friendly-fire incident that featured many of the same facts as the incident with Mr. St. George. Agent Davies was killed by his fellow LPD officer in a backyard raid in which LPD had approached surreptitiously, failed to identify themselves properly, and failed to issue a shouted warning prior to opening fire. (In that case an officer mistook Davies for a target due to the lack of ID, and force was used simultaneously with shouts, leaving no opportunity to avoid the tragedy.) The City of Lakewood paid $3.5 million to settle with the widow in spring of 2016; they ambushed Mr. St. George later on that summer. Lakewood, 395 P.3d @ 1180

An entire hornbook of use-of-force constitutional law could be printed using only cases that involve the City of Lakewood.* It is shameful that a police force charged with the protection of a lovely suburban town between Denver and Golden, Colorado should be so heavily involved in constant use-of-force litigation. No corrective action is apparent. Too many lives have been sacrificed on the altar of blind patriotic fealty to law enforcement.

* Many of these are unpublished by the courts. Many go without recompense due to inability of lay person pro-se litigants to properly state their claims. A listing appears in the Authorities.

CONCLUSION

The Tenth Circuit Opinion misapplied Supreme Court law and must be vacated and remanded with instructions. The Panel below drew inferences against Mr. St. George in a light most favorable to the Lakewood PD Defendants on a Motion to Dismiss. The Panel determined that blocked Caller-ID calls are sufficient officer identification in lieu of knock-and-announce. This despite LPD's Sgt. Muller's admission that he knew his calls to Mr. St. George were not credible ID at the time he placed them. Mr. St. George never believed the callers to be police. The Panel determined that Mr. St. George was "advancing" on Trimmer while she hid and never announced herself. The Panel determined that shooting Mr. St. George may have represented a non-lethal intent to wound him. This is not consistent with Trimmer's statements, her testimony, or her two subsequent errant shots fired at Mr. St. George as he fled. Trimmer shot to kill. Gunfire is always lethal force. No other inference is objectively reasonable.

The Panel applied Pauly II in their Opinion retroactively. Pauly I was clearly established law on the night of the LPD ambush and shooting of Mr. St. George. The ambush would never have been but for the deliberate and reckless conduct of LPD. They chose not to knock-and-announce, to talk on any of the three occasions Mr. St. George came outside, or to shout a warning before shooting.

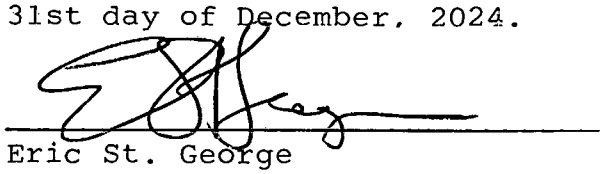
LPD's reckless conduct created the circumstances that led to their use of force. They staged an ambush. They were intent on engaging in a Mutual Combat under the false pretense that Mr. St.

George was "looking for a fight." This was presented below. In such circumstances, Heck presents no bar to suit. Mr. St. George preserved this issue in the District Court, and fully briefed the issue on appeal. The Tenth Circuit ignored this theory of the case. In a Mutual Combat scenario, Mr. St. George's convictions could be permitted to stand while LPD is simultaneiously held responsible for their conduct that violated Mr. St. George's right to be free from unreasonable use of force.

For all of the reasons presented in this petition, the Writ of Certiorari should be granted.

Respectfully submitted this

31st day of December, 2024.



Eric St. George