

No. _____

**In The
Supreme Court of the United States**

KYLE WILSON,

Petitioner,

v.

JANELLE BRIDGES, Individually and as the surviving
spouse of Shane Allen Bridges, Deceased, and as the
Mother and Next Friend of A. B., a minor child, B. B.,
a minor child, S. B., Jr., a minor child, A. C., a minor child,
J. S., a minor child, J. H., a minor child,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Tenth Circuit had jurisdiction to hear Deputy Wilson's appeal.
2. Whether upon exercising jurisdiction, the Tenth Circuit should have determined that the District Court erred in denying qualified immunity to Deputy Wilson by disregarding ALL of a law enforcement officer's testimony, including those parts that are not contradicted by any evidence in the record, in order to *create* a dispute in fact.
3. Whether upon exercising jurisdiction, the existing clearly established law would make it clear to a reasonable law enforcement officer that he would violate the law by using deadly force against an individual who turned and pointed a gun at him in a hostile motion.

PARTIES TO THE PROCEEDING

Kyle Wilson, in his individual capacity (“Petitioner” or “Deputy Wilson”) was one of the Defendants at the District Court level and was the Appellant at the Tenth Circuit level. Kyle Wilson, in his official capacity, Mayes County, and Mike Reed, in his individual and official capacities, were Defendants at the District Court level, but did not appeal the District Court’s ruling granting them summary judgment. Kyle Wilson, in his official capacity, Mayes County, and Mike Reed, in his individual and official capacities, are not joining this Petition, but are aware that the Petitioner is bringing the Petition because all Defendants are represented by the same counsel.

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PETITION FOR A WRIT OF CERTIORARI

Kyle Wilson, in his individual capacity, respectfully petitions for a Writ of Certiorari to review the judgment of the Tenth Circuit Court of Appeals in this matter.



OPINIONS BELOW

The Decision of the Court of Appeals, which was unpublished, is reprinted in the Appendix (App.) at 2-13. The District Court's opinion, which was also unpublished, is reprinted at App. 14-24.



JURISDICTION

The Court of Appeals entered its ruling on December 4, 2017, and denied a Petition for Rehearing *En Banc* on January 2, 2018. (App. 25-26). This Court has jurisdiction under 28 U.S.C. § 1254(1).



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 42, U.S.C. § 1983 states: "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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

The Fourth Amendment to the United States Constitution 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."



STATEMENT OF THE CASE

Plaintiffs' Third Amended Complaint (which numerically was actually Plaintiffs' Second Amended Complaint) asserted several causes of action against Defendants Kyle Wilson, in his individual and official capacities, Mike Reed, in his individual and official capacities, and Mayes County. In essence, Plaintiffs alleged that the use of deadly force by Kyle Wilson against Shane Bridges was an unconstitutional use of

force, and that the various other Defendants were additionally responsible for Wilson's actions under both federal 42 U.S.C. § 1983, and also under state tort law.

For the consideration of this Court, the facts of this case as found by the District Court are as follows: Deputy Kyle Wilson received a dispatch call notifying him that there was an intoxicated, possibly suicidal person who was possibly threatening harm to a child at the Bridges' residence. (Appendix, p. 18). Wilson arrived and exited his vehicle and stood by the front driver's side tire of his patrol car. (Appendix, p. 18). Bridges was in the front room of the house when Wilson arrived, and went to the door, opening and closing the door. (Appendix, p. 18). Wilson fired thirteen shots in Bridges' direction, hitting Bridges twice and fatally wounding him. (Appendix, p. 18). Deputy Wilson testified that after he exited his vehicle, Bridges opened the front door of the residence, stepped onto the front porch, and fired a single shot, although not in Wilson's direction. (Appendix, p. 18). Wilson testified that he then shouted Shane Bridges' name, after which Shane "turn[ed] and start[ed] firing again." (Appendix, p. 18). "Turning a gun on Wilson would be a hostile motion, even if Bridges did not fire." (Appendix, p. 18). "Although the testimony of Janelle Bridges and Rex Dale Cowan addresses whether Shane Bridges *fired* a gun, the only evidentiary material addressing whether Shane Bridges turned the gun in Wilson's direction is Wilson's own testimony. None of the evidentiary materials submitted by the parties contradicts Wilson's testimony on this issue." (Appendix, pp. 18-19).

To give this Court further understanding of this case, a fuller description of the facts is as follows:

Around midnight on December 31, 2013/January 1, 2014, Shane Bridges, Janelle Bridges, and minor children B. B., and A. C. went outside to shoot guns in celebration of the New Year. They shot a .410 shotgun and a .357 Ruger Blackhawk revolver. After shooting the guns, they went back inside the house, and the children went to bed. All of the children except B. B. went to sleep on beds in bedrooms located on the south side of the house. B. B. laid down on the couch near the front door to go to sleep. Janelle laid down to breast feed S. B. Jr. in the southwest bedroom of the house. Shane put the Ruger Blackhawk .357 revolver on the dresser, by the .410 shotgun and other firearms. That dresser is located by an interior wall directly in front of the front door of Bridges' house. Around the time that the Bridges got settled in for the night, Janelle's sister, Jennifer Crook ("Crook") called Janelle's cell phone. Shane, who had drunk more than six beers, answered the phone. Crook told Shane that she was coming to get her daughter, J. H., who was at the Bridges' house. Crook also wanted Shane and Janelle to come to where Crook was because they were having a party. As Crook and Shane's conversation progressed, Crook became loud and hateful. Crook said that Shane and Janelle were pieces of shit, they stole her daughter, and they ruined Crook's life. Shane went outside onto the front porch. While Shane and Crook talked, Shane told Crook, "I know how I'm going to get you, Bitch, I'm – I got your baby up here. I'm going to rip her head off with

her spine attached and stomp her guts out of her – and stomp her guts out, and then I’m going to kill myself.” Shane was slurring his words and sounded intoxicated. Crook told Shane that she would “meet him in the middle,” which meant they were going to fight. Shane also told Crook that if she came to his house, he was going to shoot her.

After Shane and Crooks’ conversation, Shane came back inside the house. He tended to the fire in the wood stove. All of the lights in the house were off, and the house was quiet. There are no street lights around the house, and the outside porch light was not on. Soon after Crook got off the phone with Shane, she called the Mayes County Sheriff’s Office and reported that Shane Bridges was intoxicated, suicidal, and threatening to hurt her child.

Deputy Wilson, the Petitioner, received a dispatch call, notifying him that there was an intoxicated, possibly suicidal person named Shane Bridges, who was possibly threatening a child, at the address near Chelsea, Oklahoma. Deputy Wilson did not recognize the address, but recognized the subject that was the subject of the call. In fact, Deputy Wilson knew Shane Bridges well enough that he believed if he was the first to get to the house, he would be able to talk to Shane and get the situation figured out. Further, before January 1, 2014, on a couple of occasions, Deputy Wilson hired Shane Bridges to cut and trim trees at Wilson’s residence. About 45 minutes after Janelle laid down to feed S. B. Jr., she saw headlights shining on the inside south wall of the house. She did not directly see the

headlights. The window in the southwest bedroom was covered by a black blanket. Shane did not say anything. At that time, Shane was wearing jeans, boots, a “couple” shirts, and a thick camouflaged jacket.

In the early morning of January 1, 2014, Deputy Wilson drove a marked Mayes County Sheriff’s Office patrol car. The decals on the patrol car are reflective, so that when light hits the decals at night, the decals illuminate. He wore a Mayes County Sheriff’s Office Class A uniform, which included a green shirt, name plate, badge, and black pants. He also wore a duty belt with various items attached to it. As he drove down the driveway, his front bright lights were activated. Neither his emergency lights nor his siren was activated. Pursuant to Deputy Wilson’s training, he did not want to approach the Bridges’ house with emergency lights and sirens because there was an alleged suicidal person who might be threatening a child inside. After Deputy Wilson stopped his patrol car near the Bridges’ house, the front lights on the patrol car remained on. Approximately thirty minutes after receiving the call regarding the individual, Deputy Wilson arrived at the Bridges’ house. Upon arrival at the Bridges’ house, Deputy Wilson stopped his patrol car and started to get out. A dog walked towards Deputy Wilson, so Deputy Wilson attempted to find his pepper spray. However, his pepper spray was not easily accessible, so he stayed in his patrol car until the dog walked near the south side of the Bridges’ house. Deputy Wilson then exited his patrol car. Deputy Wilson was attempting to get in a position so he could approach Shane, talk to him,

calm him down, and sort out any issues. He then either heard or saw something that took his attention to the front door of the Bridges' house. After seeing the headlight on the wall, Janelle heard the sound of a vehicle engine and the vehicle coming down the driveway. She has no estimation as to how fast the vehicle was going. She remained laying down on the bed in the southwest bedroom. She heard footsteps walk around to the couch to the front door and open the front door. Janelle did not see Shane at any point.

Shane Bridges stepped out onto the front porch of the Bridges' house. Wilson testified that as Shane Bridges stepped out onto the porch, Shane fired a pistol directly westbound. Deputy Wilson yelled, "Shane!" Shane Bridges then turned towards Deputy Wilson, pointed the pistol at Deputy Wilson and fired. Upon Shane pointing his pistol at Deputy Wilson and firing at Deputy Wilson, Deputy Wilson unholstered his Glock 21C .45 caliber pistol and returned fire. Wilson testified that Shane did not move off of the porch, and that Shane then retreated into the house. This entire event lasted less than ten seconds. Deputy Wilson testified that at the time that Shane Bridges shot at Deputy Wilson, and when Deputy Wilson returned fire, they were about 30 to 35 feet apart.

Deputy Kyle Wilson testified that he was in fear for his life when he returned fire at Shane Bridges, and he did not have an opportunity to de-escalate the situation before firing. Other than Shane Bridges and Deputy Wilson, there were no eyewitnesses to their interactions or the shooting itself. Neither Janelle nor

neighbor Rex Cowan saw any muzzle flashes, and neither Janelle nor Rex Cowan have any specialized training on recognizing gunfire or ballistics. Moreover, Rex Cowan could not determine what kind of gun was being fired, or whether there were multiple guns being fired; additionally, Janelle does not know whether the shots fired hit the house. After Shane retreated into the house, Deputy Wilson radioed "shots fired, shots fired." Deputy Wilson then walked to where he was behind the front passenger side of his patrol car because he did not know whether Shane was going to exit out the front door again or go out the back door and come around the house.

The gunshots startled Janelle Bridges. She did not know what was going on. Janelle does not know how many shots she heard. All of the shots were fired quickly and were fired outside. She did not see anyone shooting any firearm. She could not identify what caliber guns were being fired. Janelle did not see any muzzle flashes, nor did she hear the projectiles hitting anything.

After all of the shots were fired, Janelle heard someone stumble in the living area, she got up, put S.B. Jr. into the bassinet beside her bed, walked out of the bedroom door, and saw Shane laying on the floor, near the end of the couch. Shane's feet were just past the south edge of the couch. When Janelle exited her bedroom, she stepped over the Ruger Blackhawk .357 revolver. Janelle went to Shane; he was laying down on his side with his hands above his head. She rolled him

over. Shane looked at her, said “Babe” and his eyes rolled back.

Janelle then got up and went to the door. When she got to the door, she stuck her hands *out* the door and asked who was outside. Deputy Wilson was still standing by the front passenger side of his patrol car. She heard someone respond that it was “Kyle.” She told Deputy Kyle Wilson that Shane was hurt and needed help. During their conversation, Deputy Wilson asked Janelle, “Why is he shooting at me?” Janelle responded, “I don’t know.” She saw that Deputy Wilson was wearing a uniform. Deputy Wilson’s patrol unit’s headlights were still on. Deputy Wilson and Janelle went into the Bridges’ house, and rendered aid to Shane.

After Janelle spoke with law enforcement, she spoke with Diana Galloway, a Department of Human Services child welfare specialist. Janelle told Ms. Galloway that Shane went outside and fired three rounds before he was shot by a law enforcement officer.

When the Oklahoma State Bureau of Investigation (“OSBI”) inspected the .357 Blackhawk revolver used by Shane, it contained six shells, and three of them had been fired. After testing, the OSBI determined that the .357 Blackhawk revolver was capable of firing. Janelle does not know which way Shane was facing or the positioning of his body from the time that she heard gunshots to the time she heard him stumble. Janelle reviewed the medical examiner’s computer-generated image depicting the trajectory of the entry wounds sustained by Shane Bridges. She does not

dispute the diagram's depiction of the trajectory of projectiles that went into Shane's body on January 1, 2014.

Shane Bridges sustained two gunshot wounds. One was to his right arm and the other to his right axilla. Defendants' use-of-force expert, James F. Clark, opines that for the gunshot wound sustained to Shane Bridges' right arm to occur, Shane had to have had his right arm extended and directed towards the source of origin. Clark also opines that for Shane to have sustained the wound to his right axilla, Shane had to have had the right side portion of his body directed at Deputy Wilson when Deputy Wilson fired. The tests for gunshot residue performed by the OSBI reflect that Shane's right hand tested positive for gunshot residue.

On the night of December 31, 2013 and early morning of January 1, 2014, Shane drank at least a six-pack of beer and was intoxicated. The post-mortem laboratory analysis of Shane's blood also reveals that he was intoxicated at the time of his death. Shane's Ethyl Alcohol blood yielded a result of 0.20% with the Vitreous analysis being 0.22%.

Defendant Wilson moved for summary judgment, requesting that he receive qualified immunity. On December 12, 2016, District Judge Gregory Frizzell entered an Order dismissing all claims under 42 U.S.C. § 1983 against Defendant Wilson in his official capacity, as well as all claims against Defendant Wilson under the Oklahoma Governmental Tort Claims Act, but leaving one remaining claim against Defendant Wilson

in his individual capacity for excessive force under 42 U.S.C. § 1983. (Appendix, pp. 14-24). The Court determined that when looking at the facts in the light most favorable to the Plaintiffs, Defendant Wilson was not entitled to qualified immunity. (Appendix, pp. 14-24). Specifically, the Court found that viewing the evidence in the light most favorable to the Plaintiffs, a jury could conclude that a reasonable officer in Wilson's position would not have probable cause to believe there was an immediate threat of serious harm to himself or others, and that Bridges' constitutional rights were clearly established. (Appendix, pp. 14-24). The Court relied on the testimony of non-expert, non-eyewitnesses Janelle Bridges and Rex Cowan to rule that when looking at the facts in the light most favorable to the Plaintiffs, Shane Bridges had not fired his gun. Moreover, the District Court specifically found the following:

Deputy Wilson testified that after he exited his vehicle, Bridges opened the front door of the residence, stepped onto the front porch, and fired a single shot, though not in Wilson's direction. Wilson testified that he then shouted Shane Bridges's name, after which Shane turned and started firing again. Turning a gun on Wilson would be a hostile motion, even if Bridges did not fire. Although the testimony of Janelle Bridges and Rex Cowan addresses whether Shane Bridges *fired* a gun, the only evidentiary material addressing whether Shane Bridges *turned* the gun in Wilson's direction is Wilson's own testimony. None of the evidentiary materials submitted

by the parties contradicts Wilson's testimony on this issue.

(Appendix, p. 18).

The District Court nonetheless relied on the now-vacated opinion of *Pauly v. White (Pauly I)*, 814 F.3d 1060, 1069 (10th Cir. 2016) to determine that it should discredit all of Deputy Wilson's testimony, and to determine that there was a dispute in fact not only as to whether Shane Bridges fired his weapon, but also as to whether Shane Bridges turned and pointed the gun. (Appendix, pp. 14-24). This is the basis under which the District Court denied Wilson qualified immunity.

Wilson appealed, arguing that the District Court had erred in denying him qualified immunity. On appeal, the panel went one step further, finding that they did not have jurisdiction to hear a qualified immunity interlocutory appeal, even where the District Court had relied on and misinterpreted the vacated *Pauly I* opinion to determine that it should discredit all of Deputy Wilson's testimony. (Appendix, pp. 2-13). The Panel determined, essentially, that since the District Court had discounted Wilson's testimony, there was a dispute in fact as to whether he turned and pointed the gun at Deputy Wilson. Then, relying on the concept in *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995) that appellate courts do not have jurisdiction where the District Court denied summary judgment because of a genuine issue of material fact, the Tenth Circuit panel dismissed the appeal for lack of jurisdiction. (Appendix, pp. 2-13). The Tenth Circuit panel did examine the

exceptions where the “record blatantly contradicts the district court’s factual recitation” (Appendix, pp. 9-12), citing *Scott v. Harris*, 550 U.S. 372, 380 (2007), but determined the record did not blatantly contradict a finding that Shane Bridges turned and pointed a gun at Deputy Wilson. (Appendix, p. 12).

However, in so finding, the Tenth Circuit panel also ignored or discounted Appellant’s considerable evidence showing that the record blatantly contradicted the District Court’s findings. The panel ignored that in the immediate aftermath of the shooting, Janelle Bridges stepped over the Ruger Blackhawk .357 revolver, which had found its way from the dresser to the floor (which confirms that Shane must have picked up the gun for the altercation with Wilson). The panel also completely ignored that when the OSBI inspected the .357 Blackhawk revolver used by Shane, it contained six shells, and three of them had been fired (which confirms that the weapon had just been fired). Furthermore, the panel discounted Wilson’s evidence that Shane Bridges had to have his right arm extended and directed to the point of origin, in order to suffer the wounds that he experienced, illogically positing that it was possible Shane Bridges had his arm extended toward Wilson for some unknown reason while he was in the house. (Appendix, p. 10).

The panel, in claiming that Defendant Wilson mischaracterized the testimony, also actually mischaracterized the evidence on several points. For example, Wilson had argued that the fact that Janelle Bridges had stuck her hand out the open door immediately

after the shooting before Wilson entered the home meant that Shane Bridges must have opened the door, gone outside, closed the door behind him, engaged in the shooting, and then opened the door again as he stumbled inside. The panel claims that Janelle Bridges did not testify about whether the door was open or closed when she went outside, but the panel ignored clear testimony in the record stating the opposite. (“They were kind of up and stuck out the door just so they could see my hands . . .”). (Appendix, p. 11).

Additionally, the panel relied on inadmissible hearsay, and hearsay within hearsay: namely, unauthenticated non-expert diagrams drawn by Plaintiff’s attorney (which were interestingly NOT considered by the District Court) as evidence that the bullets that entered and killed Shane Bridges must have traveled through the house or front door before killing him. The District Court was right to ignore this “evidence.” Moreover, even if properly considered, the panel ignored Deputy Wilson’s testimony that the bullet strikes on the top of the car were the result of Shane Bridges shooting at him. (Appendix, p. 12). The panel additionally ignored the fact that two of the holes on the outside of the house were the result of Shane Bridges shooting a pistol on the inside of the house in February 2013; those shots went through the house, and Shane patched the inside of the house, but did not fix the outside siding. (Appendix, p. 12).

Similarly, the panel relied on Janelle Bridges’ testimony (also not considered by the District Court) that, from another room, she heard Shane Bridges close the

door, and walk inside the room before hearing gunshots. (Appendix, p. 11). However, the panel failed to note that there were multiple people (including numerous children) inside the house, and it is not clear whose footsteps Janelle Bridges allegedly heard. Only in this misplaced context did the panel claim not to have jurisdiction over this appeal.



REASONS FOR GRANTING THE PETITION

Petitioner Wilson now respectfully petitions for a writ of certiorari because 1) review is necessary to remedy the inconsistent application across the Circuits of the rule in *Johnson v. Jones* on the question of when an appellate court is divested of jurisdiction over an interlocutory appeal; 2) the Tenth Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power; and 3) the Tenth Circuit Court of Appeals has also decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

A. Jurisdictional Grounds

As noted above, relying on the concept in *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995) and its progeny that appellate courts do not have jurisdiction where the District Court denied summary judgment because of a genuine issue of material fact, the Tenth Circuit panel dismissed this appeal for lack of jurisdiction.

(Appendix, pp. 2-13). The Tenth Circuit panel did examine the exceptions where the “record blatantly contradicts the district court’s factual recitation” (Appendix, pp. 9-12), citing *Scott v. Harris*, 550 U.S. 372, 380 (2007), but determined the record did not blatantly contradict a finding that Shane Bridges turned and pointed a gun at Deputy Wilson. (Appendix, pp. 9-12).

The first, and primary issue, is whether the Tenth Circuit was correct to deny jurisdiction in this manner. This Court is currently facing a similar issue in a case out of the Seventh Circuit, where a Petition for Certiorari was recently granted, but a new Order has yet been issued by this Court. In *Johnson v. Stinson* (Docket No. 17-749), this very Court is currently examining the issue of whether a federal appellate court is precluded from exercising jurisdiction over a challenge to a denial of qualified immunity that turns not upon disputed facts, but upon the disputed application of the inferences drawn by the District Court from the facts. In the Seventh Circuit case, *Stinson v. Gauger*, 868 F.3d 516, 527 (7th Cir. 2015), the Seventh Circuit found that it did not have jurisdiction over a qualified immunity appeal. In the case currently pending before this Court, this Court is currently examining the scope of *Johnson v. Jones*’ limitation of appellate court jurisdiction over an interlocutory appeal of a denial of qualified immunity. This Court is, as we speak, currently determining which interpretation of *Johnson v. Jones* is correct, namely, a narrow interpretation that would bar jurisdiction only where a Defendant refuses to accept the truth of Plaintiff’s evidence at summary

judgment (an interpretation found by numerous circuits in *Camilo-Robles v. Hoyos*, 151 F.3d 1, 15 (1st Cir. 1998), *Salim v. Proulx*, 93 F.3d 86, 89-90 (7th Cir. 1996), *Schieber v. City of Philadelphia*, 320 F.3d 409, 420 (3d Cir. 2003), *Winfield v. Bass*, 106 F.3d 525, 533 (4th Cir. 1997) (en banc), *Brown v. Callahan*, 623 F.3d 249, 254-55 (5th Cir. 2010), *Nelson v. Shuffman*, 603 F.3d 439, 451 (8th Cir. 2010), *Jeffers v. Gomez*, 267 F.3d 895, 907-10 (9th Cir. 2001), *Lewis v. Tripp*, 604 F.3d 1221, 1226-28 (10th Cir. 2010), and *Morton v. Kirkwood*, 707 F.3d 1276, 1284 (11th Cir. 2013)) or a broad interpretation which bars jurisdiction whenever a Defendant challenges either the facts, OR the inferences drawn by the District Court (an interpretation developed by Circuit Courts in *Diaz v. Martinez*, 112 F.3d 1, 4-5 (1st Cir. 1997), *Locurto v. Safir*, 264 F.3d 154, 167 (7th Cir. 2001), *Ziccardi v. City of Philadelphia*, 288 F.3d 57, 61-62 (3d Cir. 2002), *Culosi v. Bullock*, 596 F.3d 195, 201-02 (4th Cir. 2010), *Smith v. Brenoettsy*, 158 F.3d 908, 913 (5th Cir. 1998), *Parks v. Pomeroy*, 387 F.3d 949, 956 (8th Cir. 2004), *Chateaubriand v. Gaspard*, 97 F.3d 1218, 1223 (9th Cir. 1996), *Fogarty v. Gallegos*, 523 F.3d 1147, 1154 (10th Cir. 2008), and *Ratliff v. DeKalb County*, 62 F.3d 338, 341 (11th Cir. 1995)).

Here, Petitioner is not challenging the truth of the evidence provided by Plaintiff, but rather the inferences drawn by the District Court: namely, the District Court's misapplication of the vacated *Pauly I* opinion to *create* a question of fact. Again, it is undisputed here that there was no evidence in the record before the District Court that Shane Bridges turned and pointed the

gun in a hostile motion at Deputy Wilson. Just as is being examined right now in the *Johnson v. Stinson* case, it is an open question whether appellate courts have jurisdiction over a qualified immunity interlocutory appeal where a party is only challenging inferences drawn by the District Court, rather than challenging the actual evidence presented by Plaintiff. Petitioner respectfully requests that this Court examine this Petition concurrently with *Johnson v. Stinson*, or hold this case in abeyance pending the outcome of *Johnson v. Stinson*, in order to determine that the Tenth Circuit in fact did have jurisdiction over the appeal in this case.

B. The Qualified Immunity Overarching Standard

Assuming that the Tenth Circuit had jurisdiction to hear the case, as there was at most a question of the District Court's drawing inferences from the undisputed facts, the next question is whether under the undisputed facts found by the District Court, Defendant Wilson's use of force violated the Constitution, and then whether a reasonable officer in the circumstances could conclude that Deputy Wilson's actions were proper in light of clearly established case law. If the answer to either question is "no," then qualified immunity provides immunity to the officers from a Section 1983 excessive force suit.

Defendants sued in their individual capacities in an action under 42 U.S.C. § 1983 "are entitled to

qualified immunity unless it is demonstrated that their conduct violated clearly established constitutional rights of which a reasonable person in their positions would have known.” *Murrell v. Sch. Dist. No. 1, Denver, Co.*, 186 F.3d 1238, 1251 (10th Cir. 1999). Qualified immunity is therefore an affirmative defense that provides immunity to suit in a § 1983 action. *See Adkins v. Rodriguez*, 59 F.3d 1034, 1036 (10th Cir. 1995). When the defense is raised, the plaintiff bears the two-part burden to show the defendant’s actions violated a constitutional right, and that the allegedly violated right was clearly established at the time of the conduct at issue. *See Mick v. Brewer*, 76 F.3d 1127, 1134 (10th Cir. 1996). Qualified immunity is an entitlement not to stand trial or face the burdens of litigation. *Mitchell v. Forsyth*, 472 U.S. 511, 527, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). It is an immunity from suit rather than a mere defense to liability. *Id.* Qualified immunity gives ample room for mistaken judgment by protecting all but the plainly incompetent or those who knowingly violate the law. *Hunter v. Bryant*, 502 U.S. 224, 229, 112 S. Ct. 532 (1991). For purposes of qualified immunity, the salient question is whether the state of the law at the time gives officials fair warning that their conduct is unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 740, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002); *Tolan v. Cotton*, 134 S. Ct. 1861, 1866, 188 L. Ed. 2d 895 (2014); *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987) (“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”) (internal quotations omitted); *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083, 179 L. Ed. 2d 1149 (2011) (“We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate”); *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023, 188 L. Ed. 2d 1056 (2014) (internal citations omitted) (“In addition, we have repeatedly told courts . . . not to define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced”).

As a threshold matter, if no constitutional right on the facts alleged would have been violated, no further inquiry is required, and the defendant is entitled to dismissal. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151 (2001), *overruled in part*, *Pearson v. Callahan*, 555 U.S. 194, 223, 129 S. Ct. 808 (2009). If a constitutional right could be made out, then “[t]he relative, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable [official in the defendant’s position] that his conduct was unlawful in the situation he confronted.” *Id.* at 202; *see also Brouseau v. Haugen*, 543 U.S. 194, 198, 125 S. Ct. 596 (2004) (emphasizing inquiry should be conducted in light of the specific context of the case).

This Court has consistently repeated the importance of looking at the specific actions of the official, and determining whether they acted unlawfully in the specific circumstances they confronted. *See Davis v. Scherer*, 468 U.S. 183, 197, 104 S. Ct. 3012, 3021, 82

L. Ed. 2d 139 (1984), *Anderson v. Creighton*, 483 U.S. 635, 639 (1987), *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083, 179 L. Ed. 2d 1149 (2011), *Tolan v. Cotton*, 134 S. Ct. 1861, 1866, 188 L. Ed. 2d 895 (2014), *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002), *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023, 188 L. Ed. 2d 1056 (2014), *City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1777-78, 191 L. Ed. 2d 856 (2015), *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015), *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015), *Pickens v. Aldaba*, 135 S. Ct. 479 at *1 (2015), *White v. Pauly (Pauly II)*, 137 S. Ct. 548, 550-51 (2017). This Court also currently has this issue on its docket in several other cases including *Kisela v. Hughes* (Docket No. 17-467), and again out of the Tenth Circuit, *Sause v. Bauer* (Docket No. 17-742).

In particular, in *Mullenix*, this Court (in a *per curiam* opinion) indicated that some lower courts, such as the Fifth Circuit, have been applying the qualified immunity doctrine in too broad of a fashion. This Court provided that for qualified immunity to be denied, precedent must “squarely govern” such that it is “beyond debate” that a constitutional violation occurred in the specific context of the case. *Mullenix, supra*, at 309. This Court again also noted that clearly established law is not to be defined at a high level of generality and courts are not to supplant their own judgment as to the merits of the available options, but rather must simply decide whether the case law renders it beyond debate that a constitutional violation occurred at the time of

the incident. *Id.* Circuit courts, including the Tenth Circuit very recently in *Pickens, supra*, and *Pauly II, supra*, have repeatedly been admonished to follow this Court's rulings on the importance of looking at the specific facts of the case, rather than examining the law at too high a level of generality.

C. There Was No Clearly Established Law

Here, the Tenth Circuit Court of Appeals, in denying jurisdiction, and therefore accepting the District Court's denial of qualified immunity, has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power. Moreover, the Tenth Circuit Court of Appeals has also decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

Assuming that the Tenth Circuit had jurisdiction (as discussed above), Plaintiff has not met his burden to show that the allegedly violated right was clearly established at the time of the conduct at issue. Again, as stated above, this Court has repeatedly made very clear that for qualified immunity to be denied, precedent must "squarely govern" such that it is "beyond debate" that a constitutional violation occurred in the specific context of the case. *Mullenix, supra*, at 309; *Pauly II, supra*, at 550-51.

Here, no court (neither the District Court nor the Tenth Circuit) has cited a single case that would have put Deputy Wilson on notice that his actions were

unlawful based on the particular circumstances he confronted. Again, this is a situation where even the District Court found that there was no evidence in the record to contradict that Shane Bridges turned a gun on Wilson, which was a hostile motion. (Appendix, pp. 18-19).

The District Court cited to only two cases in support of its finding that the law was clearly established. The first, *Jiron v. City of Lakewood*, 392 F.3d 410, 414 (10th Cir. 2004), was cited by the District Court strictly for the general proposition of what “clearly established law” is. (Appendix, p. 20). In fact, the police officer in that case was found to have acted objectively reasonably in using deadly force, where a suspect was attempting to escape with a deadly weapon in hand. *Jiron*, *supra*, at 419. Certainly, *Jiron* did not make it clear to a reasonable official in Deputy Wilson’s position that his actions were unconstitutional under the situation he confronted.

The second, *Pauly v. White (Pauly I)*, 814 F.3d 1060 (10th Cir. 2016), was inappropriate on a number of levels. First and foremost, that opinion was decided in February of 2016, over two years *after* Kyle Wilson’s use of force on Shane Bridges. For this original reason, it was clear that any ruling in the Tenth Circuit’s opinion on *Pauly I* could not have made it clear to a reasonable official in Wilson’s position in January of 2014 that his actions were unconstitutional. Secondly, the Tenth Circuit’s opinion in *Pauly I* was *vacated* by this Court in another *per curiam* opinion. See *Pauly II*, *supra*, at 550-53. In that case, as in other cases, this

Court yet again reminded the Tenth Circuit that for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate, and that clearly established law cannot be defined at a high level of generality; this Court then ruled that the Tenth Circuit had looked at the governing principle at too high a level of generality, and therefore determined that the officer in that case had NOT violated clearly established law by using deadly force on an individual without warning. *See Pauly II, supra*, at 550-53. Therefore, for this additional reason, the *Pauly I* case, which is what was cited by the District Court, could not have made it clear to Defendant Wilson that his actions violated the Constitution.

If we assume that Shane Bridges turned and pointed the gun at Deputy Wilson, as we must, again neither the District Court nor the Tenth Circuit could cite any case that would make it clear to a reasonable official in Defendant Wilson's position that his actions were unlawful. Neither the Plaintiff nor the District Court cited to any case that says so. Moreover, the jurisprudence in place in the Tenth Circuit as of January 1, 2014 clearly said otherwise. *See Thomson v. Salt Lake County*, 584 F.3d 1304, 1318-19 (10th Cir. 2009) (granting qualified immunity where a suspect had pointed a gun at an officer prior to the use of deadly force); *see also Wilson v. Meeks*, 52 F.3d 1547, 1554 (10th Cir. 1995), *abrogated on other grounds by Saucier*, 533 U.S. 194, 205, 121 S. Ct. 2151 (holding that officer acted reasonably in shooting suspect who was pointing gun in officer's direction); *Pauly III, supra*, at

1222-23 (granting qualified immunity to an officer where a gun was pointed at him from 50 feet away, under cover of night). Even in the tied decision on Plaintiffs’ Petition for Rehearing *En Banc* in the *Pauly I* case, Circuit Judge Hartz, joined by then-Circuit Judge Gorsuch dissented from the denial of rehearing, stating “I am unaware of any clearly established law that suggests, much less requires, that an occupant pointing a firearm in his direction must refrain from firing his weapon but, rather, must identify himself and shout a warning. . . .” *Pauly v. White*, 817 F.3d 715, 718 (10th Cir. 2016) (decision on rehearing *en banc*).

Even looking at the facts in the light most favorable to the Plaintiff as found by the District Court, there was no clearly established law in the Tenth Circuit making clear to a reasonable official in Defendant Wilson’s position that his actions in using deadly force on an individual who had turned toward him with a pointed firearm, violated the Constitution. Neither the District Court, nor the Plaintiff, nor the Tenth Circuit, have pointed to any such clearly established law. Thus, it is beyond legitimate dispute that Defendant Wilson is clearly entitled to qualified immunity. The denial of qualified immunity violates this Court’s consistent precedent that there must be case law squarely governing, rendering it beyond debate, that a reasonable officer would know these actions violated the Constitution. The denial of qualified immunity by the Tenth Circuit therefore has clearly so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court’s supervisory power. Moreover, the Tenth Circuit Court of Appeals has also

decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

D. The Tenth Circuit's Application of the *Pauly* Cases Created Disputes in Fact where None Existed

Again, the District Court here found that there was no evidence in the record to contradict that Shane Bridges turned and pointed the gun at Deputy Wilson in a hostile motion. Both the District Court and the Tenth Circuit (in denying jurisdiction) have nevertheless *created* a dispute in fact by relying on a cautionary suggestion in *Pauly I* that a Court should not rely exclusively on an officer's account, but should look at the circumstantial evidence. Again, however, *Pauly I* was vacated by this Court in *Pauly II*, so this was not appropriate for either the District Court or the Tenth Circuit to do. However, even if either the District Court or the Tenth Circuit did maintain *Pauly I*'s caution regarding believing an officer's account if it benefits the officer, the lower Courts should also have looked deeper into the case that *Pauly* cited out of the Third Circuit, *Abraham v. Raso*, 183 F.3d 279, 294 (3d Cir. 1999). In *Abraham*, the Third Circuit was cautious in believing an officer's self-serving account *only* where the *available physical evidence, combined with inconsistencies in the officer's testimony*, contradicted the officer's version of events. *Id.* at 294; *see also Hickenbottom v. Nassan*, 2007 WL 7753803 at *26-27. Here, there were no such contradictions.

Further, on October 31, 2017, after this Court vacated the Tenth Circuit’s opinion in *Pauly I*, the Tenth Circuit also issued another opinion in the *Pauly* case, *Pauly III. Pauly v. White (Pauly III)*, 874 F.3d 1197 (10th Cir. 2017). In *Pauly III*, the Tenth Circuit continued to cite *Abraham, supra*, for the proposition that a Court should be cautious in relying exclusively on an officer’s self-serving account where the only other witness is dead, if the physical evidence contradicts the officer’s story, and there are inconsistencies in the officer’s story itself. *Pauly III*, at 1217-18.

Close examination of the Tenth Circuit’s application of this principle in *Pauly III* is necessary. The case involved the approach of a house by three officers after a report that a driver housed at the residence had been driving recklessly and throwing up gang signs. *Id.* at 1203-04. The officers approached the house, in which two brothers were housed, at night, in the rain, screaming “Hey, (expletive), we got you surrounded. Come out or we’re coming in. . . . Open the door. Open the door.” *Id.* at 1204-05. Two of the officers observed one of the brothers open the front window to the house and point a handgun in the direction of one of the officers. *Id.* at 1205. One of the officers believed that one of the brothers had fired his handgun. *Id.* at 1217. The Tenth Circuit, relying on the caution expressed above regarding relying exclusively on an officer’s testimony where the witness is killed, thus did find that in the light most favorable to Plaintiffs, the brother “did not fire his weapon at Officer White, but only pointed it in his direction while Officer White was fifty feet away.” *Id.* at 1217-18. The Tenth Circuit did so in a particular

context, however. The Tenth Circuit found there was a question of fact about whether the brother had actually fired his weapon based on *clear forensic evidence* that no shots were fired from the brother's handgun. *Id.* Furthermore, even where there was clear forensic evidence that the brother had absolutely *not* fired his weapon, the Tenth Circuit still only used the maxim described in *Abraham, supra* to discredit the officers' testimony that the brother HAD fired his weapon. The Tenth Circuit in *Pauly III* did not make the next illogical leap of disbelieving uncontroverted facts stemming from the officer's testimony. Again, even where the Tenth Circuit found that the forensic evidence actively disputed the officers' accounts that the brother had fired his weapon, it still accepted the officers' accounts that the brother had pointed the handgun in the direction of one of the officers. *Id.* So, the clear lesson from the Tenth Circuit opinion in *Pauly III* is that Courts should indeed be cautious in believing facts presented by the officer, when those facts are belied by the physical evidence and there are inconsistencies in the officer's testimony. However, even under those circumstances, a Court is still not entitled to *create* disputes of fact when a fact is otherwise undisputed. In *Pauly III*, the Tenth Circuit could not, and did not, create a dispute in fact as to whether the brother pointed the gun at the officer. Notably, the Tenth Circuit went on to rule that the officer who used deadly force on the brother (who had pointed the gun at him) was entitled to qualified immunity, as there was no case close enough on point to make the unlawfulness of the officer's actions apparent. *Id.* at 1223.

Here, neither the District Court nor the Tenth Circuit panel was entitled to use the *Pauly* and *Abraham* cases to discount Deputy Wilson's testimony that Shane Bridges fired at him. There simply are no inconsistencies in Deputy Wilson's testimony. Moreover, the available physical evidence does not contradict Deputy Wilson's version of events, but rather supports it.

Again, when the OSBI inspected the .357 Blackhawk revolver used by Shane, it contained six shells, and three of them had been fired. After testing, the OSBI determined that the .357 Blackhawk revolver was capable of firing. Janelle also does not know which way Shane was facing or the positioning of his body from the time that she heard gunshots to the time she heard him stumble. Janelle reviewed the medical examiner's computer-generated image depicting the trajectory of the entry wounds sustained by Shane Bridges. She does not dispute the diagram's depiction of the trajectory of projectiles that went into Shane's body on January 1, 2014. Shane Bridges sustained two gunshot wounds. One was to his right arm and the other to his right axilla. Defendant's use-of-force expert, James F. Clark, opines that for the gunshot wound sustained to Shane Bridges' right arm to occur, Shane had to have had his right arm extended and directed towards the source of origin. Clark also opines that for Shane to have sustained the wound to his right axilla, Shane had to have had the right side portion of his body directed at Deputy Wilson when Deputy Wilson fired. Moreover, the tests for gunshot residue performed by the OSBI reflect that Shane's right hand

tested positive for gunshot residue. Clearly, the physical evidence therefore *supports* Deputy Wilson's account that Shane Bridges fired at him, rather than contradicting that account. Moreover, Janelle herself admitted to Diana Galloway after the shooting that Shane Bridges was shooting at Kyle Wilson.

All this evidence, plus the admissible circumstantial evidence (including the fact that the door was open after the shooting, the fact that Janelle stepped over the gun after the shooting, and the reasons why the bullet holes existed, as described in the Statement of the Case above), reinforces the view that Shane Bridges was *outside* the front door at the time of the shooting, rather than inside. Thus, neither the District Court nor the Tenth Circuit should have discounted Deputy Wilson's testimony regarding Shane Bridges firing at him. However, even if they *did* disregard Deputy Wilson's testimony regarding Shane Bridges firing his weapon, neither the District Court nor the Tenth Circuit were entitled to *create* a dispute in fact regarding whether Shane Bridges turned and pointed the gun at Deputy Wilson in a hostile motion. The Tenth Circuit could not do that in *Pauly III*, and it should not have done that here. Put simply, since the District Court was barred from making this leap, it is undisputed that Shane Bridges turned and pointed the gun in a hostile motion at Deputy Wilson, and thus Deputy Wilson is clearly entitled to qualified immunity, as laid out above. The District Court's decision otherwise, and the Tenth Circuit panel's denial of jurisdiction (which essentially affirmed the District Court's decision)

therefore has clearly so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power.

E. Certiorari Should be Granted

For all of these reasons, it is apparent that certiorari should be granted. First and foremost, Petitioner is not challenging the truth of the evidence provided by Plaintiff, but rather the inferences drawn by the District Court: namely, the District Court's misapplication of the vacated *Pauly I* opinion to *create* a question of fact. Thus, the Tenth Circuit Court of Appeals did have jurisdiction to hear this appeal, and the Tenth Circuit's denial of jurisdiction was erroneous. Review on certiorari is therefore necessary to remedy the inconsistent application across the Circuits of the rule in *Johnson v. Jones* on the question of when an Appellate Court is divested of jurisdiction over an interlocutory appeal. Again, it is undisputed here that there was no evidence in the record before the District Court disputing that Shane Bridges turned and pointed the gun in a hostile motion at Deputy Wilson. Just as is being examined right now in the *Johnson v. Stinson* case, it is an open question whether appellate courts have jurisdiction over a qualified immunity interlocutory appeal where a party is only challenging inferences drawn by the District Court, rather than challenging the actual evidence presented by Plaintiff. Petitioner respectfully requests that this Court examine this Petition concurrently with *Johnson v. Stinson*, or hold this case in abeyance pending the outcome of *Johnson v. Stinson*,

in order to determine that the Tenth Circuit in fact did have jurisdiction over the appeal in this case.

Moreover, the Tenth Circuit has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power; the Tenth Circuit has also decided an important question of federal law in a way that conflicts with relevant decisions of this Court. Namely, the Tenth Circuit, in denying jurisdiction, and thus allowing the District Court to deny qualified immunity, even where there was no case law remotely on point that would make it clear to a reasonable officer in Deputy Wilson's position that his conduct violated the Constitution, conflicted with this Court's decisions in *Davis v. Scherer*, 468 U.S. 183, 197, 104 S. Ct. 3012, 3021, 82 L. Ed. 2d 139 (1984), *Anderson v. Creighton*, 483 U.S. 635, 639 (1987), *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083, 179 L. Ed. 2d 1149 (2011), *Tolan v. Cotton*, 134 S. Ct. 1861, 1866, 188 L. Ed. 2d 895 (2014), *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002), *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023, 188 L. Ed. 2d 1056 (2014), *City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1777-78, 191 L. Ed. 2d 856 (2015), *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015), *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015), *Pickens v. Aldaba*, 135 S. Ct. 479 at *1 (2015), and *White v. Pauly*, 137 S. Ct. 548, 550-51 (2017) (*Pauly II*). Without any case law remotely on point that would make it clear to Deputy Wilson that it violated the law to use deadly force on an individual who had turned and pointed a gun at him in a hostile motion, the lower

courts' denials of qualified immunity necessarily conflicted with repeated admonitions by this Court, even admonitions to the Tenth Circuit itself.

The Tenth Circuit, in allowing the District Court to *create* a question of fact, based on a misplaced application of a vacated opinion (*Pauly I*) additionally made a quantum leap in logic, which is neither accepted nor usual in the course of judicial proceedings. For all of the above reasons, Petitioner respectfully requests that the Court grant certiorari in the instant case.

◆

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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