

No. 19-609

In the
Supreme Court of the United States

ERIN SHEPHERD AND TERRY REED,
Petitioners,

v.

ANGELA STUDDARD,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners, two Shelby County Sheriff's Deputies on July 7, 2016, shot Edmond Studdard, Deceased as he stood and/or swaying in place in the middle of a grassy area east of Northbound Big Orange Road at approximately noon on a clear summer day in Shelby County, Tennessee. Respondents fired five shots while both were standing in the Southbound lane of Big Orange Road at a distance of thirty four (34) feet from Edmond Studdard, Deceased with no less than two bullets striking Edmond Studdard as he held a boxcutter handle without a razor blade to his own throat. Edmond Studdard, Deceased at the time of the shooting and immediately prior to in the presence of Petitioners, never threatened to hurt anyone but himself and had not made any movements towards anyone with the "knife" or boxcutter handle. Edmond Studdard died approximately two months after the shooting from the bullet wounds that he suffered. On Petitioner's motion for summary judgment based upon qualified immunity, the district court concluded that genuine issues of material fact precluded it from granting the motion. The Sixth Circuit affirmed in an unanimous decision. The question presented is:

Whether this Court should review the Sixth Circuit's decision affirming the district court's conclusion that genuine issues of fact preclude summary judgment for petitioner.

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CONSTITUTION

U.S. Const. amend. IV 21, 25, 27, 29

**STATEMENT OF ISSUE
PRESENTED FOR REVIEW**

Whether the Sixth Circuit of the United States Court of Appeals correctly ruled that Respondent met her burden of showing that Shepherd and Reed were not entitled to qualified immunity in light of controlling law in the shooting of Eddie Studdard.

For purposes of this Appeal, Petitioner Erin Shepherd will be referred to as “Shepherd”, Petitioner Terry Reed will be referred to as “Reed”, Respondent Angela Studdard will be referred to as Plaintiff and/or Respondent and/or Angela Studdard and Edmond Studdard will be referred to as “Edmond”, “Studdard” and/or “Eddie Studdard”.

INTRODUCTION

On the morning of July 7, 2016, “Eddie Studdard” was 46 years old, married to Respondent Angela Studdard and living with his wife and two daughters in Shelby County, Tennessee. (Medical Record/TBI File, RE 132, Page ID# 2008) Eddie Studdard was part owner of A&H Ironworks, LLC, a business which was located on private property on Big Orange Road in Shelby County, Tennessee that made custom ornamental fencing and railing along with his father Hollis Studdard, Sr. and his brother, Ricky Studdard.

Eddie Studdard had been suffering from some type of lung condition over the previous two years and had been dealing with a lot of pain and his health insurance had lapsed at some point prior to that date and Eddie asked his father that morning to borrow some money so that he could go to his doctor’s appointment that day.

When Hollis Studdard, Sr. refused, Eddie became upset and apparently suffered some type of emotional or mental issue and he drove his pick up truck into the back of his father's unoccupied corvette which was located on the driveway of the private property owned by A&H Ironworks and then to abandon his truck, to slit his own wrists in the bathroom of A&H Ironworks and then start walking northbound on the right side of Big Orange Road away from A&H Ironworks. There was no evidence of a physical fight between Eddie and his father. All of this information was unknown to Appellants Shepherd and Reed and the other deputies on the scene on Big Orange Road at the time that Eddie Studdard was shot by Shepherd and Reed.

It is undisputed that Shepherd and Reed fired a total of five times with their 40 caliber service pistols at Studdard that day (Reed fired two times and Shepherd fired three times) with one and/or two bullets striking Eddie's arm and one bullet entering the right side of Eddie's neck, severing his spine and rendering him a quadriplegic from July 7, 2016, where he was transported by ambulance and was hospitalized and underwent multiple surgeries and medical procedures at Regional One Hospital in Memphis, Tennessee, up to the date of his premature death in the Hospital on September 4, 2016, caused by the gunshot wounds of July 7, 2016. It is undisputed that Eddie suffered greatly over this two month period before his death. (Medical Records, RE 132, Page ID# 2005-2006)

Photographs of Eddie Studdard **prior** to the shooting and **after** the shooting while hospitalized at Regional One Hospital can be found at Affidavit of

Angela Studdard, RE 167, PageID# 167-1, Page ID# 2696-2699, RE 168-1, PageID# 2703-2704) The post shooting photographs clearly and undisputedly show the extreme pain and suffering that Eddie Studdard endured after was shot.

There is no proof that Eddie had any prior history of mental illness or psychiatric diagnosis and/or treatment prior to July 7, 2016. After the shooting, while Eddie was an admitted patient at Regional One Hospital and prior to his death, he remembered getting into the disagreement with his father, slitting his wrists and deputies being on Big Orange Road but did not know why they shot him. (Medical Records of Studdard/TBI File, RE 132, PageID# 56, 2008-2009)

The shooting of Eddie by Shepherd and Reed, viewed in the light most favorable to Angela Studdard and/or Eddie Studdard was objectively unreasonable considering and viewing the facts taken in the light most favorable to Respondent immediately before and at the time of the shooting.

STATEMENT OF THE CASE

On July 7, 2016, Deputy Sheriff Kyle Lane who was employed by the Shelby County Sheriff's Department and was dispatched by radio to Big Orange Road in Shelby County, Tennessee to fill out a report concerning a male white who was involved in an accident and hit another vehicle on private property located at A&H Ironworks. The male white had left the scene of the accident but there were no reports of personal injury but only property damage to the vehicle. (Deposition of Kyle Lane, RE 96-1, PageID#

981-982, 987) As Deputy Lane was traveling southbound on Big Orange Road and approaching the address of A&H Ironworks, he saw and passed a male white who was walking northbound on Big Orange Road. Deputy Lane testified that he had no reason to believe that Eddie Studdard was the person involved in the hit and run. It was around noon on a clear July day. Deputy Lane was informed by an adult male at the A&H address that the individual walking northbound on Big Orange Road, later identified as Edmond "Eddie" Studdard, Deceased, had slit his own wrists. (Lane Deposition, RE 96-1, PageID# 989,995)

Having just learned of this information and not knowing any other information and having no knowledge that Eddie Studdard committed any crime or whether Studdard was even involved in the hit and run, Deputy Lane turned his motorcycle around on Big Orange road and began to follow Eddie Studdard as he walked and/or ran northbound on Big Orange Road to investigate the situation. (Lane Deposition, RE 96-1, PageID# 994, 1004-1005)

As Deputy Lane approached Eddie Studdard slowly from behind on his motorcycle as they were traveling northbound on Big Orange Road, Deputy Lane saw blood on both of Eddie Studdards' wrists and he knew at that moment that Eddie Studdard had cut his own wrists. (Lane Deposition, RE 96-1, PageID# 994- 995) Deputy Lane alleges that Eddie Studdard was nonresponsive to his verbal commands and that Eddie Studdard opened his hand and showed him what Deputy Lane believed to be a knife. It was at that moment that Deputy Lane told dispatch that "both

wrists of respondent are slit”. (Lane Deposition, RE 96-1, PageID# 1007) and requested back up from the Shelby County Sheriff’s Department and continued to follow Eddie Studdard at a safe distance as he continued to walk northbound on Big Orange Road. (Lane Deposition, RE 96-1, PageID# 1004, 1007)

As Deputy Lane continued to follow him northbound on Big Orange Road, Deputy Lane could tell that Eddie Studdard appeared in distress and Lane notified Sheriff Department’s dispatch that the male white, later identified as Eddie Studdard was **not resisting, just walking around with knife in his hand.** (Lane Deposition, RE 96-1, PageID# 1005-1006) Deputy Lane said that after Eddie Studdard showed him the knife, that Eddie Studdard did not act aggressive and never tried to stab him, never threatened him verbally and never tried to knock him of his motorcycle as Eddie Studdard continued to walk and/or run northbound on Big Orange Road. (Lane Deposition, RE 96-1, PageID 1004) Deputy Lane continued to follow Eddie Studdard as he walked northbound on Big Orange Road and that he followed him for three to five minutes covering approximately $\frac{3}{4}$ of a mile. (Lane Deposition, RE 96-1, PageID# 1011, 1015) During this time frame, Eddie Studdard never tried to stab, cut or point the knife at Deputy Lane or threaten him. (Lane Deposition, RE 96-1, PageID# 1011-1013, 1015) Deputy Lane said that Eddie Studdard had a “decent amount of blood” on both of his wrists (Lane Deposition, RE 96-1, PageID# 1014) Deputy Lane said that Eddie Studdard looked in “distress”. (Lane Deposition, RE 96-1, PageID# 1013) PageID 1726-27)

As Eddie Studdard continued to walk northbound on Big Orange Road with Deputy Lane following him, Deputy Lane testified that he followed him on his motorcycle for three to five minutes before the other deputies showed up. (Lane Deposition, RE 96-1, PageID# 1015) Immediately prior to the other deputies arriving on Big Orange Road, Deputy Lane testified that Eddie Studdard did not represent an immediate threat of death to Deputy Lane or anybody else. (Lane Deposition, RE 96-1, PageID# 1016) During this time, Deputy Lane testified that it appeared to him that Eddie Studdard had emotional issues and was trying to kill himself. (Lane Deposition, RE 96-1, PageID# 1015-1016)

As Eddie Studdard and Deputy Lane approached and are getting closer to the intersection of Macon Road and Big Orange Road, Deputy Lane testified that he saw three or four vehicles ahead and that the County Sheriff's Deputies arrived on Big Orange Road, traveling in the opposite direction and parked their vehicles on Big Orange Road, approximately one hundred yards from the intersection of Macon Road. (Lane Deposition, RE 96-1, PageID# 1018-1020) Deputy Lane testified that Big Orange Road is a wide road with single lanes of traffic for northbound and southbound traffic on the road and that two solid yellow lines run down the middle of Big Orange Road separating northbound from southbound traffic on Big Orange Road with a curb running parallel with the road. (Lane Deposition, RE 96-1, PageID# 1020-1021) Deputy Lane testified that on the east side of northbound Big Orange Road, there is a grassy area which runs from the curb to a wooden fence to the east

of Big Orange Road. (Lane Deposition, RE 96- 1, PageID# 1021-1022)

Deputy Lane testified in his deposition that the deputies that showed up on the scene, parked their vehicles in the southbound lane of Big Orange Road. (Lane Deposition, RE 96-2, PageID# 1025) There were no obstructions on Big Orange Road that prevented Deputy Lane from clearly seeing the other deputies who he later identifies as Defendant Shepherd, Defendant Reed and Deputy Pair. (Lane Deposition, RE 96-2, PageID# 1025) At the time that the other deputies arrived on the scene, Eddie Studdard **walked away from** all of the deputies and into the grassy area on the east side of northbound Big Orange Road and he backed up and had his back to the fence. (Lane Deposition, RE 96-2, PageID#1029) When Eddie Studdard first stopped, Deputy Lane testified that Eddie Studdard began to sway in place in the grassy area while facing west. (Lane Deposition, RE 96-2, PageID# 1030-1031) At this time, Deputy Lane testified that the “knife” was down by his side and that Eddie Studdard was in the grassy area and not pointing the “knife” at Lane. (Lane Deposition, RE 96-2, PageID# 1031-1032)

Plaintiff’s credible and admissible proof is that Eddie Studdard was standing in the grassy area and Deputies Reed, Shepherd, Pair and Deputy Lane had Eddie Studdard surrounded and pinned in with the wooden fence behind him while Eddie Studdard was standing in the grassy area. (Shepherd Deposition, 136-139) (Lane Deposition, RE 96-3, PageID# 1098-1099) It is undisputed that all four deputies had their pistols

drawn and aimed at Eddie Studdard. Defendant Shepherd testified in her deposition that Eddie Studdard was standing in the grassy area midway between the Big Orange Road and the fence. (Shepherd Deposition, RE 106, PageID# 1454-1455)

Eddie Studdard was standing in the grassy area and swaying in place and **he continued to hold the “knife” down and was not charging anybody.** (Lane Deposition, RE 96-2, PageID# 1039-1040) Deputy Lane testified that one deputy shouted put the knife down or I’m going to shoot. (Lane Deposition, RE 96-2, PageID# 1037) Deputy Lane testified that after this happened, Eddie Studdard raised the knife to his **own** throat in a slicing position on the right side of his neck. (Lane Deposition, RE 96-2, PageID# 1037-1039) Deputy Lane testified that his was the **first and only time** that Eddie Studdard raised the “knife” other than the initial time that Studdard had shown it to Deputy Lane at the very beginning of when Lane began to follow him. Deputy Lane testified that almost **immediately** after Eddie Studdard raised the knife to his own throat, Eddie Studdard was shot. (Lane Deposition, RE 96-2, PageID# 1039) It is undisputed that Defendants Lane and Shepherd both fired multiple shots at Eddie Studdard and that he was hit in the arm and neck and/or throat by two or three of the five bullets and mortally wounded, rendered a quadriplegic and subsequently died of his injuries in the hospital on September 4, 2016, approximately two months after the shooting.

Defendant Shepherd gave a sworn declaration and testified that Eddie Studdard **never said anything**

throughout the whole ordeal. (Shepherd Deposition, RE 106, PageID# 1466) (Statement of Shepherd, RE 132-1, PageID# 2098) Defendant Shepherd testified that at the time that Eddie Studdard raised the knife to his own throat, she believed he was going to cut his own throat. (Shepherd Deposition, RE Page ID# 1466-1477) Defendant Shepherd further testified that once Eddie Studdard put the knife to his own throat, that he **never** moved it away from his throat until the time that he was shot. Defendant Shepherd testified that Eddie Studdard **never** left the grassy area. (Shepherd Deposition, RE 106, PageID# 1470) Defendant Shepherd further testified that Eddie Studdard **never** made a stabbing or lunging motion toward her or anyone else prior to being shot. (Shepherd Deposition, RE 106, PageID# 1469)

Deputy Lane testified that at the time that the shots were fired that he was not in fear for his life. (Lane Deposition, RE 96-2, PageID# 1041) Deputy Lane testified in his deposition that prior to Eddie Studdard being shot, that he was not charging anybody. (Lane Deposition, RE 96-2, PageID# 1040) Deputy Lane testified that he did not know why Shepherd or Reed fired shots at Eddie Studdard. (Lane Deposition, RE 96-2, PageID# 1042) Deputy Lane testified that Deputy Pair did not fire and neither did he. (Lane Deposition, RE 96- 2, PageID# 1042) At the time that the shots were fired, Deputy Lane testified that he felt no imminent threat to himself or anyone else. (Lane Deposition, RE 96-2, PageID# 1044)

Lane further testified that Eddie Studdard never pointed the knife at Lane or any of the other deputies.

Lane testified that Eddie Studdard never waived the knife around, never ran towards Lane, never ran towards Shepherd or Reed with a knife in his hands, never ran towards Pair. (Lane Deposition, RE 96-2, PageID# 1056) Eddie Studdard dropped straight to the ground when he was shot and fell on his back. (Lane Deposition, RE 96-2, PageID# 1057-1058) Deputy Lane does not remember if they moved Eddie Studdard after he was shot.

Deputy Lane testified that “**at the time of the shooting**”, that Eddie Studdard was pinned in **and had not threatened anybody, was not an imminent threat of death or serious bodily injury to anybody except himself** and that Lane did not feel threatened at that point and time. (Lane Deposition, RE 96-3, RE PageID# 1099-1101) Up to the point where Eddie Studdard was shot, he had not attacked anybody. (Lane Deposition, RE 96-3, PageID# 1106) Deputy Lane did not shoot. (Lane Deposition, RE 96-3, PageID# 1106-1107) Lane had an unobstructed view of the scene on Big Orange Road **before and at the time of the shooting**. (Lane Deposition, RE 96-3, PageID# 1111)

Deputy Lane testified that Eddie Studdard **never walked towards anybody** with a knife or whatever he had in his hands prior to the shooting. (Lane Deposition, RE 96-3, PageID# 1110) Further, Eddie Studdard **never walked towards anybody** while he had a knife to his own throat. (Lane Deposition, RE 96-3, PageID# 1110) Deputy Kyle Lane testified that Eddie Studdard fell in the exact spot he was standing and that he dropped to the ground. (Lane Deposition,

RE 96-4, PageID# 1144) Deputy Lane does **not** know the exact area where Eddie Studdard fell after being shot. (Lane Deposition, RE 96-4, PageID# 1165) See Exhibit to 16 Deputy Lane's testimony regarding the area where Eddie Studdard fell after the was shot in the grassy area. Lane Deposition, RE 96-4, PageID# 1165, RE 96-5, PageID# 1216)

At the time that Petitioners Reed and Shepherd fired their weapons at Eddie Studdard, Deputy Lane testified that Eddie Studdard was **not a fleeing felon, not threatening imminent serious bodily injury to anyone aside from himself.** (Lane Deposition, RE 96-4, PageID# 1176) Deputy Lane testified at this time there was nothing obstructing his or Reed's or Shepherd's view of Eddie Studdard. (Lane Deposition, RE 96-4, PageID# 1177) The shooting occurred in an open space during the middle of the day. (Lane Deposition, RE 96-4, PageID# 1176)

Deputy Lane testified that if a person is threatening suicide or harm to themselves, deadly force is **never** an option for a Shelby County Sheriff's Deputy. (Lane Deposition, RE 96-4, PageID# 1177) Deputy Lane testified that he would **never** shoot someone to prevent them from committing suicide and to do so would be a violation of Shelby County Sheriff Department's deadly force policy. (Lane Deposition, RE 96-4, PageID# 1178-1179)

Deputy Lane testified that **at the time of the shooting of Eddie Studdard, there was no doubt that Eddie Studdard was suffering some type of mental crisis or illness or disorder.**

Deputy Lane further testified that at the entire time that Eddie Studdard was in the grassy area **that he never pointed a knife at anyone and he never threatened anybody with a knife, never going towards them and never pointing the knife at them.** (Lane Deposition, RE 96-4, PageID# 1181) Deputy Lane testified that at the time of the shooting that **he could have waited five more hours as long as Eddie Studdard continued not to be aggressive.** (Lane Deposition, RE 96-4, PageID# 1183)

Deputy Lane testified under oath that Eddie Studdard **was not advancing towards anybody** before the shots were fired or at the time the shots were fired. (Lane Deposition, RE 96-4, PageID# 1183) Deputy Lane further testified that Eddie Studdard never attacked anybody before the shots were fired. (Lane Deposition, RE 96-4, PageID# 1183)

Towards the end of the deposition of Kyle Lane conducted by Respondent's counsel, the following questions and answers were provided, recorded and video taped:

Question by Attorney Seward: "I want you to stand up and show the videographer how he (Studdard) was moving. Was he moving toward people or swaying?"

Answer by Deputy Kyle Lane: "He was swaying like this (**demonstrating**)." ...

Question by Attorney Seward: "Okay. Was he advancing toward anybody?"

Answer by Deputy Kyle Lane: “Not that I saw. No, sir”.

Question by Attorney Seward: “Okay. Did he attack anybody with whatever was in his hand?”

Answer by Deputy Kyle Lane: “No, sir”.

Question by Attorney Seward: “Prior to being shot?”

Answer by Deputy Kyle Lane: “No, sir.”

Question by Attorney Seward: “Never?”

Answer by Deputy Kyle Lane: “No, Sir.”

(Deposition of Kyle Lane, RE 96-4, PageID# 1183)

Eddie Studdard was **never** charged with any crime by any law enforcement or the Shelby County Sheriff’s Department for anything or any act that took place on July 7, 2016.

Deputy Abdullah testified under oath that **at the time that Deputy Shepherd and Deputy Reed fired their pistols and shot Eddie Studdard, Deputies Pair and Defendant Shepherd and Defendant Reed were all standing in the southbound lane of Big Orange Road** and that Abdullah was less than 50 yards away heading southbound on foot on Big Orange Road. (Deposition of Abdullah, RE 104, PageID# 1409 and RE 104, PageID# 1418, Page 1407) The last time that Abdullah saw Studdard before the shooting, Studdard was in the grassy area and never came back onto Big Orange Road. (Deposition of Abdullah, RE 104, PageID#

1408,1412) Shepherd, Reed and Pair were all in the southbound lane of Big Orange Road with their pistols drawn and aimed at Studdard prior to the shooting. (Deposition of Abdullah, RE 104, PageID#1410) Deputy Abdullah testified that he did **not** feel threatened by Studdard and that Abdullah never pulled his gun and did not aim it at Studdard. (Deposition of Abdullah, RE 104, PageID# 1413, 1411)

EMS Natalie Stewart provided emergency medical care to Eddie Studdard on July 7, 2016 after he was shot and she did so in the grassy where Eddie Studdard's body was located on the ground in the grassy area after the shooting. EMS Natalie Stewart provide emergency medical care to Eddie Studdard at the scene and while in transport to Regional One Medical Center. EMS Natalie Stewart executed a Sworn Declaration that Eddie Studdard's body was in the grassy area when she arrived and administered medical care to Studdard and she states in her Sworn Declaration that **Eddie Studdard's body was over ten (10) feet east of the curb of northbound Big Orange Road when she arrived to administer emergency medical care.** (Sworn Declaration of Natalie Stewart, RE 95, PageID# 920-921)

Jason Cunningham executed a Sworn Declaration that he was familiar with Big Orange Road and that he worked at a gym located across the street from the shooting of Eddie Studdard and that he was present inside his employer's building at the time of the shooting of Eddie Studdard. Jason Cunningham states in his Sworn Declaration that "The distance from the curb on the eastern side of Northbound Big Orange

Road to the first yellow solid line in the middle of Big Orange Road is over twenty-four (24) feet. He further declares that the distance from the curb on the eastern side of Northbound Big Orange Road to the curb and/or driveway located on the western side of Southbound Big Orange Road is greater than forty-eight (48) feet. He further declares that “the distance from the curb on the eastern side of Northbound Big Orange Road across the grassy area to the wooden fence that was located there on July 7, 2016 is greater than nineteen (19) feet”. (Sworn Declaration of Jason Cunningham, RE 94, PageID# 917-919)

If the distance from the middle of Big Orange Road to the eastern edge and/or curb is greater than 24 feet and Defendants Shepherd and Reed were standing in the southbound lane of Big Orange Road at the time that they shot Eddie Studdard who was in the grassy area at the time of the shooting, Defendants Reed and Shepherd shot Eddie Studdard at a minimum of 24 feet and not 7 to 10 as they claim. This calculation of 24 feet **would not** include any additional feet that Eddie Studdard would have been in the grassy area on the east side of Big Orange Road when he was shot, which the Appellee has presented as ten (10) additional feet for **total of thirty-four (34) feet separating Reed and Shepherd from Eddie Studdard when he was shot.**

Petitioner adopts Plaintiff’s Rule 26 Expert Report of Jeffrey Noble herein as if stated in verbatim. Petitioner adopts said report and said report’s citation of the statements of fact and opinions of Jeffrey Noble. (Rule 26 Expert Report of Jeffrey Noble, RE 99, Page

ID#1276-1305) Jeffrey Noble opines that “Based upon the statements of Deputies Lane, Pair and Abdullah and the physical evidence, Mr. Studdard was **not an imminent threat to either Deputy Shepherd or Deputy Reed. Mr. Studdard was not moving toward the deputies** at the moment that deadly force was used, he had the knife held at his own neck, and if Deputies Shepherd and Reed were in the southbound lane of traffic and Mr. Studdard was in the middle of the grassy area, Mr. **Studdard would have been at least 34 feet away from the officers at the moment of the shooting.** Thus, the **use of deadly force would not be objectively reasonable or consistent with generally accepted police practices.**” (Noble Rule 26 Expert Report, RE 99, PageID 1292)

Petitioners’ Rule 26 Expert Richard Lichten states and opines in his Rule 26 Expert Disclosure that:

Mr. Noble and I do agree if the decedent was in fact standing still and had not made a move at all toward the shooter deputies, the shooting would be unjustified.

(Rule 26 Expert Disclosure of Richard Lichten, RE 89-10, PageID#753)

Further, Petitioners’ Rule 26 Expert Richard Lichten testified under oath in his deposition that opines that:

“If you accept that the decedent was standing still in the **middle of the grass area** and if you accept that the **shooter deputies were in the southbound lane** as Mr. Noble states, the Mr.

Noble's math makes sense and he'd be right ...And the same would be true, as you just said, if it was 34 feet or 7 feet. If that was true, **if Mr. Studdard was standing still and not acting aggressively.**"

(Deposition of Richard Lichten, RE 98, PageID#1272)

Defendants' Rule 26 Expert also testified during his deposition that **the "21 foot Rule" is not a rule per se ...The 21 foot rule isn't necessarily a rule, although that's what it's called.**" (Deposition of Richard Lichten, RE 98, PageID# 1263)

During Erin Shepherd's discovery deposition, Petitioner's counsel asked Shepherd the following:

Question by Attorney Seward: ...In this case, did you feel that Eddie Studdard was an eminent (imminent) or immediate threat to cause you serious bodily injury or death at the time you pulled the trigger?

Answer by Shepherd: Yes.

Question by Attorney Seward: Why?

Answer by Shepherd: Because we are trained on a 25 foot rule in relation to bladed weapons. That someone within the 25 feet can get to us and injure us before we can draw out weapons and pull the trigger. And so we're not supposed to – we're trained not to let someone in that 25 foot threshold who has a weapon, rather

it's to their throat, out at us, or anything like that.

Question by Attorney Seward: Okay. You called it the 25 foot rule. Is that – a written rule that Shelby County Sheriff's Department has adopted?

Response by Shepherd: As far as I know, yes. The research has been done on it. **It used to be 21 feet but I believe they've extended it in the past few years to 25 feet. ...** I don't know about the policy. **I know that that's what we're trained.**

(Deposition of Erin Shepherd, ECF No. 105, 1-3, deposition pages 173-175)¹

The Tennessee Bureau of Investigation conducted an investigation into the shooting of Edmond Studdard and as part of that investigation approximately two

¹ After the shooting in this cause and after the close of discovery, Petitioner's counsel learned after reading the complaint to her pending lawsuit against Shelby County, Tennessee and the Shelby County Sheriff's Department, that Appellant Erin Shepherd was relieved of duty in May of 2018. Shepherd received a letter from Shelby County Sheriff's Office advising that it had been determined that she cannot perform the essential job functions of a Sheriff Patrol Officer as required and was therefore relieved of duty without pay. (Shepherd's Complaint against Shelby County, et al. Appellant Shepherd now alleges that she was wrongfully terminated as a Sheriff's Deputy on September 6, 2018. (Complaint of Appellant Erin Shepherd vs. Shelby County, RE 156-1, Page ID# 2601-2620 The District Court did not have knowledge of this information or consider it at the time of ruling on the summary judgment motion.

hundred photographs were taken by the TBI after the shooting on July 7, 2016. The photographs are part of the record in this cause and provide relevant evidence and information regarding the scene of the shooting on Big Orange Road. TBI Photographs of Big Orange Road, RE 135-1, PageID# 2325 through 152-37, Page ID# 2540.

The facts in this appeal are undisputed that Studdard did not have a gun but instead was holding a box cutter handle **without a razor blade in it and not a knife or bladed weapon.** The possession of a knife and/or pocket knife in public is not a crime in the State of Tennessee. Eddie was not advancing, walking or moving towards anyone but standing still and/or swaying in place in the grassy area east of northbound Big Orange Road while being at least 34 feet away from Shepherd, Reed and Pair, with all three standing in the southbound lane of Big Orange Road at the time of the shooting.

Eddie was more than 30 feet from Deputy Lane at the time that Shepherd and Reed shot him Eddie was **not** moving towards, walking towards, approaching, running, attacking or charging towards Shepherd and Reed or anyone else but was **standing still and/or swaying in place** in the grassy area on the east side of northbound Big Orange Road the entire time that Shepherd, Reed, Pair and Lane had their guns pointed at him, up to the time that Shepherd and Reed shot Eddie Studdard. There is admissible proof that Studdard never verbally threatened Shepherd, Reed, Pair, Lane or anyone else on the scene prior to and/or at the time that Eddie was shot. Shepherd and Reed

had no information that Eddie had committed a crime of any type. Eddie was not a fleeing felon and he was on foot, surrounded by the Shepherd, Reed, Pair and Lane at the time that he was shot. Eddie never pointed the boxcutter handle which did not have a razor blade in it at anyone except to put it to his own throat at the time that he was shot. Eddie was shot around noon on July 7, 2016 while standing the grassy area which is east side of northbound traffic on Big Orange Road.

Shepherd, Reed, Pair and Lane had approached Eddie Studdard and had Eddie boxed in with a wooden fence to Eddie's back. It was a hot summer day on July 7, 2016 with no obstructions on or near Big Orange Road that would prevent Deputy Lane from seeing of the events as they unfolded on Big Orange Road prior to and at the time of the shooting of Studdard. There was plenty of room for Shepherd and Reed to back up and/or escape. Reed, Shepherd, Pair and Lane all had their 40 caliber pistols pointed at Eddie immediately before and at the time that Eddie was shot.

There was **no split second decision** to be made as Lane stated in his deposition when he testified that he did not know why Shepherd and Reed fired when they did and that he could have stayed there on Big Orange Road with Eddie surrounded for as much time as was needed.

REASONS FOR DENYING THE PETITION

- I. The Court of Appeals agree on the test applicable to the reasonableness of an officer's use of deadly force under the Fourth Amendment and have reached consistent results.
- II. The Sixth Circuit correctly applied this Court's Fourth Amendment jurisprudence.
- III. The Fourth Amendment violation was clearly established.
- IV. This case does not present an appropriate vehicle for review because material issues of fact remain to be resolved.

The Courts apply a two-prong test and inquire whether (1) whether the facts, taken in the light most favorable to the party asserting the injury, show that the officer's conduct violated a constitutional right and (2) whether the right violated was clearly established such that "a reasonable official would understand that what he is doing violates that right. Saucier v. Katz, 533 U.S. 194, 201-02 (2001) It is black letter law that individuals have a clearly established right not to be shot absent a probable cause belief that that individual poses a threat of serious physical harm. Mullins v. Cyranek, 805 F.3d 760, 765 (6th Cir. 2015) Further, just because the Courts must look at the circumstances through the eyes of a reasonable officer does **not** mean that the Courts must accept the officer's subjective view of the facts when making the assessment. Rather, the Courts must conduct the reasonable officer analysis using the facts in the in the

light most favorable to the plaintiff. Bougress v. Mattingly, 482 F.3d 886, 887-889 (6th Cir. 2007).

Excessive force claims are analyzed under an objective reasonableness standard. Graham v. Connor, 490 U.S. 386, 397 (1989) The Courts consider the facts and circumstances of each case, including the severity of the crime at issue; whether the suspect posed an immediate threat to the safety of the officers or others; and whether the suspect was actively resisting arrest or attempting to evade arrest by flight. Sigley v. City of Parma Heights, 437 F.3d 527, 534 (6th Cir. 2006) The ultimate inquiry must always be whether the totality of the circumstances justified the use of force. Mullins v. Cyranek, 805 F.3d 760 (6th Cir. 2015) “In excessive force cases, the threat factor is a **‘minimum requirement for the use of deadly force,’** meaning that deadly force ‘may be used only if the officer has probable cause to believe that the suspect poses a threat of severe physical harm.” Mullins v. Cyranek, 805 F.3d 760, 766 (6th Cir. 2015) Further, the Plaintiff must show that the constitutional right was clearly established in a ‘particularized sense,’ such that a reasonable officer confronted with the same or similar situation would have known that using deadly force under those circumstances would violate that right. Chappell v. City of Cleveland, 585 F.3d 901, 907 (6th Cir. 2009) Consonant with that requirement, the United States Supreme Court recently reminded lower courts “not to define clearly established law at a high level of generality.” Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) In determining whether an official’s conduct violates a clearly established constitutional right of which a reasonable person would have known,

the focus is on whether the official had **fair notice** that their conduct was unlawful, with the reasonableness being judged under the law at time that the conduct took place. Brosseau v. Haugen, 543 U.S. 194, 198 (2004)

The United States Supreme Court in Kisela reaffirmed that “this Court’s caselaw does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate.” Kisela, 138 S. Ct. at 1152.

CLEARLY ESTABLISHED LAW

In this case, Eddie Studdard was never charged with any crime. Further, Eddie Studdard was not actively resisting arrest. Eddie Studdard’s conduct did not rise to the level of active resistance. The Sixth Circuit Court of Appeals has held that mere noncompliance is not active resistance. Eldridge v. City of Warren, 533 F. App’x 529, 535 (6th Cir. 2013) Further, Eddie was not attempting to flee nor was he a fleeing felon. Just the opposite, Eddie was surrounded and boxed in a semi circle in by the four deputies with the wooden fence to his back. He wasn’t going anywhere and he did not try to go anywhere. Shepherd, Reed and the other deputies on the scene had it under control in that there was no reasonable threat of escape or flight by Eddie Studdard prior to being shot. The main issue to be resolved is whether Eddie Studdard posed an imminent threat of serious bodily harm to Shepherd and/or Reed or anyone else on the scene. In excessive force cases, the threat factor is ‘a minimum requirement for the use of deadly force,

meaning deadly force may only be used if the officer has probable cause to believe that the suspect poses a threat of severe physical harm. Mullins, 805 F.3d at 766.

In this case, the Plaintiff has presented admissible material evidence to show that Eddie Studdard was never verbally threatening anyone, never moving and/or walking towards, running towards or attempting to attack Defendant Shepherd, Defendant Reed or anybody else in the area of Big Orange Road through the sworn testimony of Deputy Kyle Lane.

Further, Plaintiff has presented admissible evidence that Deputy Reed and Deputy Shepherd were 34 feet or more away from Eddie Studdard when they shot him. Plaintiff's Rule 26 Expert Jeffrey Nobles opines that the shooting was a violation of police practices by Defendant Shepherd and Defendant Reed. Defendants' Rule 26 Expert Richard Lichten agrees that the shooting was unjustified and a violation of police practices if Eddie Studdard, at the time that he was shot, was thirty-four (34) feet away from Reed and Shepherd and standing still and not moving towards Defendant Reed or Deputy Shepherd or anyone else at the time that he was shot.

There is ample admissible evidence in the record of this cause to present a disputed issue of material fact on the issue of whether Eddie Studdard was a threat to anyone except himself, there is admissible facts that Eddie Studdard was **not** moving towards or walking towards Reed and Shepherd or anyone else at the time that he was shot. Also, Appellee has presented admissible facts and inferences that no one was in

danger and/or in striking distance of Eddie Studdard regarding the distance that Eddie Studdard was from Reed and Shepherd at the time that he was shot where there is admissible evidence in the record that Eddie Studdard was 34 feet or more away from Shepherd and Reed when they shot him. Here there is ample admissible evidence in the record upon which the trier of fact could believe that Petitioners had no objectively reasonable belief that Studdard posed an imminent threat of serious bodily injury or harm to anyone except himself.

Therefore, based upon the totality of the circumstances known to Reed and Shepherd at the time of the shooting, the use of deadly force was objectively unreasonable and violated the Fourth Amendment.

The second prong of the qualified immunity analysis is to determine whether the right in question was clearly established at the time of the violation. Hope v. Pelzer, 536 U.S. 730, 739 (2002) Respondent asserts that the state of the law at the time of the incident provided notice and resulting fair warning to Defendants Shepherd and Reed that their alleged conduct was unconstitutional.

Respondent distinguishes prior decisions where a suspect is holding what appears to be a knife or bladed weapon and is advancing or moving towards someone and along with the distance that an individual is from someone who is holding a knife and/or bladed weapon. In this instance, there is ample admissible proof that Eddie Studdard was never moving towards and/or attacking Shepherd and Reed or anybody else. Further,

there is ample admissible proof in the records that Eddie Studdard was 34 feet or greater from the Defendants Reed and Shepherd when they shot him holding what they alleged was a knife but in reality, could have been nothing more than a box cutter handle without any razorblade in it. Regardless, Studdard never made any type of movement towards Shepherd, Reed or anyone else on the scene of Big Orange Road at or before the time that Studdard was shot. Studdard never threatened anyone verbally or physically.

The Plaintiff relies upon the following cases which were in force prior to the shooting of Eddie Studdard on July 7, 2016 to show that the constitutional right was clearly established as an obvious case, existing precedent that squarely governs the specific facts at issue and that places the constitutional question beyond debate and/or a consensus of cases of persuasive authority that clearly establish the constitutional right:

Sixth Circuit Precedent:

Respondent submits that adequate controlling precedent is cited in Sova v. City of Mt. Pleasant, 142 F.3d 898 (6th Cir. 1998) In this published opinion and controlling precedent from the Sixth Circuit, Thomas Sova was suffering from depression who was armed with two butcher knives and was harming himself with the knives. In this case, Sova wanted the police to shoot him. Sova was in his parents' home and claims that the police officers shot him before he ever walked out of the kitchen door towards the officers. The Sixth Circuit reaffirmed the precedent of the Court and ruled that taking the facts in the light most favorable to Sova,

that if the jury determines that the police officer shot Sova without a reasonable belief that he posed a significant threat of death or serious bodily injury to the officer or others, then the police officers actions of shooting Sova were legally unreasonable under the Fourth Amendment and therefore a violation of Sova's clearly established constitutional rights. Again, the facts in this case are that Sova, like Studdard, possessed a bladed weapon, with some type of mental issue but was not advancing toward the officers when he was shot. This precedent from the Sixth Circuit is analogous to the facts and law concerning the Studdard appeal and again reaffirms in the Sixth Circuit that a person has a right not to be shot unless perceived to be an immediate threat of death or serious bodily injury in this factually similar case.

Russo v. City of Cincinnati, 953 F.2d 1036 (6th Cir. 1992) This published opinion states the clearly established precedent from the Sixth Circuit which states and reaffirms that a person has a constitutional right not to be shot by the police unless that person is perceived to pose a threat to the pursuing officers or others. Id. at 1045. Russo is a factually similar case in which a man, like Studdard, suspected of having mental issues, who threatened to take his own life and being armed with a bladed weapon and both were shot by police. In that case, the Court held that considering the evidence in the light most favorable to the decedent, there would be a violation of the decedent's constitutional right not to be shot by police where the decedent was shot while he was on the stairs some six to seven steps below the officers and not advancing towards the officers. The District Court ruled that this

case was established precedent in the Sixth Circuit and that “Russo strongly supports that there is a clearly established right that squarely governs the facts at issue in this case.” Petitioner agrees with argument made in Appellants’ brief that “Russo stands for the proposition that shooting a suspect who “[never stood up or charged towards officers” is unreasonable.” Appellants’ brief at page 29 Considering the facts in the light most favorable to the Petitioner, there is admissible proof and/or inferences that Studdard was standing still and/or swaying in place, more than 34 feet from Reed and Shepherd and that he never threatened anyone verbally or physically and did not make any movement towards anyone with a bladed weapon. Studdard was holding the boxcutter to his own throat and not moving towards anyone at the time that he was shot nor was within striking distance with the box cutter without a razor blade. Studdard was not a threat of death or serious bodily injury or harm under the totality of the circumstances. As a result, the constitutional rights and contours are sufficiently definite with this established precedent that would have placed Shepherd and Reed on notice that a reasonable official in their position would have known that they were violating the constitutional rights of Eddie Studdard when they shot him causing his severe damages and premature death.

Ciminillo v. City of Cincinnati, 434 F.3d 461, 469 (6th Cir. 2006) This Sixth Circuit decision and precedent, as recognized by the District Court in this case, held that the police officer in that case was “on notice that it is unreasonable to use beanbag propellants against individuals who pose no threat to

officer safety” based on Ninth Circuit caselaw. Id. and District Court’s Order denying summary judgment in this appeal.

Zulock v. Shures, 441 F. App’x 294 (6th Cir. 2010) (Unpublished) In this case, the Court was again reviewing an appeal where Zulock had been shot by a police officer while holding a 10” steak knife in his kitchen and had refused to drop it and backed or moved away from the police officer while using verbally abusive language. In that case, the police officer was investigating a minor hit and run and had been trained on the 21 foot rule as Shepherd in this appeal. The Sixth Circuit held:

If Zulock was approximately twenty feet from Officer Shures, and if Zulock did not brandish or point the knife at Officer Shures, and if Zulock was turning away from Officer Shures when he was shot in the back of the shoulder, then a reasonable jury could conclude that Officer Shures used excessive force against Zulock in violation of his Fourth Amendment rights.

Id.

In Zulock, the Sixth Circuit held that shooting a man approximately 20 feet away holding a knife but not attacking or moving towards anyone and/or threatening the police or anyone else with death or serious bodily injury is an **obvious case** of violating the constitutional rights of Zulock under the totality of the circumstances.

Scozzari v. Miedzianowski, 454 F. App’x 455 (6th Cir. 2012) (Unpublished) The Sixth Circuit denied

qualified immunity to police officer who shot a suspect who was alleged to have been wielding a knife and hatchet over his head and whether the situation required a **split second** decision to use lethal or deadly force were issues for the jury to determine. Viewing the evidence in the light most favorable to the plaintiff, the Court denied qualified immunity to the police officer because there were facts if believed by the jury that the decedent was 15 to 20 feet from the officers when he was shot, was not wielding a knife and hatchet over his head in aggressive fashion and was not walking towards the officers when he was shot. This case again relies on Sixth Circuit precedent that has long recognized that a person holding a bladed weapon, not moving towards the police or anyone else, who is 15 to 20 feet away from police and others and the officer has his gun aimed at the suspect, is not an imminent or immediate threat of death or serious bodily injury to the officer or others and shooting said suspect under those factual circumstances is a violation of a clearly established right with facts similar to the Studdard appeal and providing resulting notice of constitutional violation to Shepherd and Reed.

Lopez v. City of Cleveland, 625 F. App'x 742 (6th Cir. 2015) (Unpublished) The Sixth Circuit again denied qualified immunity to officer viewing the facts in the light most favorable to the plaintiff, who shot a **suspect holding a knife but not moving towards or attacking anyone**. Footnotes to the decision stated that the law was clearly established that officers cannot use deadly force unless there was probable cause to believe that the person posed a risk of serious risk of harm to officers or others. Again, this fact

pattern is similar to the Studdard case where person is shot by police but there is evidence that the person held a bladed weapon, threatening to hurt only themselves and not moving towards or attacking the police or anyone else.

Other Circuits:

Pitzer v. Tenorio 802 F.3d 1160 (10th Cir. 2015) cert. denied by U. S. Supreme Court April 18, 2016; Tenth Circuit Court of Appeals denied qualified immunity to police officer who shot a suspect who was holding a bladed weapon to his own throat, made no threatening gestures towards anyone and was shot before he was within striking distance of the police or anyone else, only harming himself and not charging anyone. See Zuchel v. Spinharney, 890 F.2d 273 (10th Cir. 1989); Tenth Circuit denied qualified immunity to police officer who shot suspect with knife who was 10-12 feet from officer and not charging or threatening officer with knife.

Walker v. City of Orem, 451 F.3d 1139 (10th Cir. 2006) Tenth Circuit Court of Appeals recognized and “specifically established that where an officer had reason to believe that the suspect was holding a knife, not a gun, and the suspect was not charging the officer and had made no slicing or stabbing motions toward him, that it was unreasonable for the officer to use deadly force against the suspect”. Id. at 1160. See Williams v. Indiana State Police Department, (No. 142523) Consolidated with Brown v. Wayne Blanchard and Walworth County Wisconsin, (No. 14-2808) (7th Cir. 2015) cert. denied to U.S. Supreme Court April 25, 2016. In Brown, the Seventh Circuit Court of Appeals

denied qualified immunity to police officer when viewing the evidence in the light most favorable to the Plaintiff, that the Plaintiff possessed a bladed weapon or knife, was emotionally upset, refused to drop knife, was threatening suicide but was not approaching or threatening anyone with death or serious bodily injury and was only passively resisting.

Glenn v. Washington County, 673 F.3d 864 (9th Cir. 2011) Glenn held pocket knife to his neck and threatened to kill himself. Glenn had committed no crime but was upset and destroying some of his personal property. Glenn had no altercation with anyone, was not threatening anyone, police were 6 to 12 feet from Glenn and he didn't have any guns nor was he wanted for a crime by the authorities. Like Studdard, Glenn did not drop the pocket knife when ordered but he never threatened anyone with death or serious bodily injury except himself.

Mercado v. City of Orlando, 407 F.3d 1152 (11th Cir. 2005) The 11th Circuit Court of Appeals denied summary judgment to police officer on grounds of qualified immunity where officer shot suspect who was holding a knife and threatening only himself but suspect was not moving towards or threatening death or serious bodily injury to police or anyone else.

Duong v. Telford Borough, 186 F. App'x 214 (3d Cir. 2006) Third Circuit Court of Appeals held that viewing the facts in the light most favorable to the Plaintiff, that a constitutional violation may have taken place when police shot Duong who was holding a knife but

not pointing it at police or anyone else nor was he threatening anyone with death or serious bodily injury.

All cases cited predate the shooting of Eddie Studdard in this cause and clearly establish and place Defendant Shepherd and Defendant Reed on notice that the shooting of Eddie Studdard when he was not moving toward or advancing towards either and he was at a distance of at least thirty-four (34) feet when he was shot that he could not have constituted an imminent threat to cause death or serious bodily injury to anyone nor was there any reasonable or probable cause that Eddie Studdard was an immediate threat to cause serious bodily injury or death to either Shepherd or Reed or anyone else.

Petitioners cannot rely upon the following cases to define clearly established law. Kisela v. Hughes, 138 S. Ct. 1148 (2018) is a U.S. Supreme Court decision that was rendered after July 7, 2016, the date of the shooting in this case and therefore the facts and ultimate ruling by the Supreme Court ruling are respectfully not to be considered by this Court in defining the relevant clearly established law at the time.

Stevens-Rucker v. City of Columbus, OH 739 F. App'x 834 (6th Cir. 2018) was issued after July 7, 2016 and cannot be used to define the clearly established law on that date.

The Sixth Circuit properly reviewed the caselaw relevant to Petitioners' Motion for Summary Judgment and examined the legal position of both sides in evaluating prior cases and ending the review by

applying the facts in the light most favorable to the Petitioner to reach the legal conclusions. Petitioners' argument has no merit that the Court of Appeals considered the wrong set of operative facts in reaching the legal conclusions. The Sixth Circuit considered the Petitioner's facts in the light viewed most favorably to the Respondent and properly concluded that there is a genuine issue of material fact in dispute that prevents summary judgment.

CONCLUSION

The United States Court of Appeals for the Sixth Circuit properly denied qualified immunity to Shepherd and Reed because their conduct in shooting a man holding a boxcutter without a razor and/or what appeared to be a bladed weapon was not objectively reasonable under the totality of the circumstances facing the Petitioners on July 7, 2016. Shepherd and Reed were on notice that shooting Eddie Studdard was a violation of his established constitutional rights when Studdard was shot when he was not moving towards Shepherd and Reed or anyone else, holding the bladed weapon to his own throat, not threatening anyone except himself, made no verbal or physical threats to anyone, was passively resisting at best, was not a fleeing felon and was at least 34 feet away from Shepherd and Reed and not within a distance to anyone that Studdard would constitute a threat of serious bodily injury to anybody. The totality of the circumstances in this appeal presents an obvious case involving the violation of Eddie Studdard's clearly established rights. Regardless, existing precedent in the Sixth Circuit placed the constitutional question

beyond debate and the precedent cited by Respondent squarely governs the issue in this appeal. Respondent has further provided authority from other Circuits that establishes a consensus of cases of persuasive authority which clearly established Eddie Studdard's constitutional right to not be shot by Shepherd and Reed. As a result, Respondent respectfully request that this Honorable Court deny Shepherd and Reed's Petition in this cause and to remand this matter to the District Court for jury trial.

Respectfully submitted,

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