No. 20-1461

In The Supreme Court of the United States

JAIRO ACOSTA,
Police Officer for the City of Los Banos,

Petitioner,

v.

TAN LAM,
as Successor-in-Interest to Decedent Sonny Lam
(aka Son Tung Lam),

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is it plain error to admit evidence of a police officer's self-reported PTSD symptoms when they directly implicate his ability to perceive, recall, and credibly relate the event in question, where the officer failed to object to the evidence at trial and instead made the tactical decision to challenge the importance of the evidence?

2. Is it clearly established that an officer cannot use deadly force on an unarmed suspect who previously injured the officer and was shot in the leg by the officer, after the officer has retreated from the suspect and when the incapacitated suspect is falling or has already fallen to the ground?

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INTRODUCTION

This case involves the fatal shooting of Respondent's son Sonny Lam, who was having a mental health crisis, by City of Los Banos, California police officer Jairo Acosta. In violation of his training to deescalate encounters with mentally ill suspects, Acosta grabbed Sonny, attempting to forcefully remove him from his bedroom. Sonny stabbed Acosta with scissors. Acosta shot Sonny in the leg, retreated down the hallway away from Sonny, spoke with Sonny's father, and cleared a jam in his gun. When Sonny was clearly incapacitated in the hallway (either falling or had already fallen to the ground), Acosta shot him again in his chest, even though he no longer had the scissors. A jury found that Acosta used unreasonable force and the Ninth Circuit upheld the District Court's denial of qualified immunity for the second shot, as it was a clearly established Fourth Amendment violation, amongst the Circuit Courts, to use deadly force against a suspect who, though initially dangerous, has been disarmed or otherwise become non-dangerous.

The jury heard evidence that Acosta self-reported troubling symptoms (such as forgetfulness, irritability, and dissociative flashbacks) and was diagnosed with PTSD two-years prior to the shootings, had a work-incident consistent with PTSD a year before that, and another PTSD incident just a year prior to trial. Acosta failed to object to this evidence at trial. His trial testimony was riddled with inconsistencies and at odds with physical evidence. The Ninth Circuit properly found the PTSD evidence was relevant to Acosta's

ability to perceive, recall, and credibly relate the incident, and that the PTSD evidence was not remote. This decision is entirely consistent with this Court's precedents, and there is no split of authority that warrants further review of this issue. Petitioner does not argue (because he cannot) that the Ninth Circuit incorrectly stated the legal rules that apply to these evidentiary decisions. Rather, Petitioner merely asks this Court to second-guess the court's application of those rules to the particular facts of this case. There is no basis to upset those rulings.

STATEMENT OF THE CASE

A. Factual Background

1. The Evidence Adduced at Trial Reveals that Acosta Used Unreasonable Deadly Force Against Sonny Lam

On September 2, 2013, 80-year-old Tan Lam ("Mr. Lam) was living with his 42-year-old son, Sonny Lam ("Sonny"). 976 F.3d at 991; SER[1] 44–45. Sonny suffered from hearing voices and diabetes and had stopped taking his medications for months, which caused his physical and mental health to deteriorate. SER 45–48. Sonny stood 5'8", weighed a paltry 136 pounds, and was "very frail." 976 F.3d at 991; SER 66. That day, Sonny and Mr. Lam argued. SER 49–50. Believing the police would take Sonny to a hospital, Mr. Lam asked

[1] References to "SER" are to the Supplemental Excerpts of Record filed with the Ninth Circuit.

a neighbor to call 911. SER 47–48, 50. Officer Jairo Acosta ("Acosta") from the Los Banos Police Department arrived soon thereafter. SER 51. Mr. Lam told Acosta that Sonny had lost his mind. SER 51.

Mr. Lam walked Acosta into the home and opened Sonny's bedroom door. SER 52, 133. Sonny was sitting down in his chair, wearing nothing but basketball shorts. SER 52, 55. He began yelling at Acosta. 976 F.3d at 992. Acosta immediately grabbed Sonny's shoulder and tried to pull him out of the room, and goaded Sonny to fight him saying "beat me, beat me." SER 53–54. Sonny said "no, no, no," punched in the air, and then stood up and pushed Acosta and Mr. Lam out of his bedroom and into the hallway. SER 54–56, 58. Sonny did not have anything in his hands during this struggle. SER 55, 59. Acosta's aggressive approach to Sonny was contrary to his training to deescalate or calm the situation, to assume a quiet, nonthreatening manner, and to call for back-up when dealing with a mentally ill suspect. SER 91–92; SER 163–164.

Acosta, who stood at 5'11" and weighed 250 pounds at the time of the shootings, testified that Sonny grabbed scissors from his desk. SER 138–140. Sonny then stabbed Acosta, making a small puncture wound in his left forearm. 976 F.3d 993. Acosta shot Sonny in the lower leg. *Id*. Despite Acosta's testimony, the jury specifically found that Sonny did not grab

Acosta's gun before the first shot. ER[2] 12. Acosta then retreated, as the jury specifically found. *Id*.

Acosta attempted to shoot a second time, but his gun malfunctioned, so as he continued to back up, he performed a "tap, rack, and roll" technique to clear the jam. 976 F.3d 992; SER 140–143; ER 196–198. Mr. Lam ran to Acosta and asked why he shot Sonny. Acosta said Sonny had a knife. 976 F.3d at 992. Acosta continued retreating and when he was near the corner of the hallway where it turned, he fired again at Sonny, who was still in the main hallway. *Id*. It was undisputed that Acosta did not provide a warning to Sonny before firing the second shot. *Id.*

Sonny had moved down the hallway toward Acosta after the first shot, but without the scissors. The jury specifically found that Sonny was not armed when Acosta shot him for the second time. ER 12. The District Court and the Court of Appeals found that the detailed evidence was sufficient to support that conclusion. 976 F.3d at 995–96. The second shot hit Sonny and he fell to the ground. *Id.*

Sonny was fatally wounded by the gunshot to his chest. SER 78. According to Dr. Mark Super, a forensic pathologist, who performed an autopsy on Sonny, the fatal bullet entered Sonny's left side through his ribs and traveled in a relatively steep downward angle ending in his right-side flank area. SER 78–79, 81–84. Acosta testified and demonstrated for the jury that he

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[2] References to "ER" are to the Excerpts of Record filed with the Ninth Circuit.

fired the second shot consistent with his training to shoot straight ahead and chest high, again straight on. SER 143–144. However, the steep-downward and sideways path of the bullet belies Acosta's testimony that Sonny was standing or facing Acosta at the time of the second shot. SER 126, 278. It would be more accurate to conclude that Sonny was stumbling down the hallway, incapacitated by the wound to his leg from the first shot, and had either fallen or was falling at the time of the second shot. 976 F.3d at 1000.

2. Evidence Regarding Acosta's PTSD Diagnosis was Relevant to his Ability to Perceive and Recall the Events and the Shootings

Acosta, an Iraqi war veteran discharged from service in 2006, testified that he sustained physical and emotional injuries during his military service. SER 96–97, 100–101, 151–152, 155, 238, 241–246. In February 2011, Acosta reported he had been experiencing sleeplessness, impatience, frustration, short temperedness, a ringing in his ears, and poor vision at night for approximately one year when he decided to go the Veterans Administration (VA) for help. SER 149–152. Acosta informed VA Nurse Practitioner Mary Jimenez that his symptoms for headaches, poor concentration and difficulty making decisions were moderate; that his vision problems and blurry vision, hearing difficulty, sensitivity to noise, forgetfulness, and slow thinking were severe; and that his symptoms of feeling anxious, tense, irritable and being easily

annoyed, poor frustration tolerance, and feeling easily overwhelmed were very severe. SER 222–226. Acosta indicated that: 1) these symptoms had interfered with his social life, marriage, and work in the past 30 days, and 2) the status of these symptoms since the time of deployment was worse. SER 226.

In June 2011, Acosta met with VA clinical psychologist Dr. Joseph Shuman and reported feeling similar emotional experiences at his work as a police officer and his missions in Iraq. He said that he was having recurring and distressing recollections (i.e., flashbacks) as though the traumatic events from his service in Iraq were recurring (i.e., reliving the experience, illusions, hallucinations, and having dissociative flashback episodes). SER 234–236, 239–240, 241. Acosta reported these flashbacks were intensely distressing psychologically, and that clearing houses and drawing his weapon could be triggers for him. SER 242. Acosta reported that he was experiencing difficulty falling and staying asleep, irritability, outbursts of anger ("which he [thought] stems from being repeatedly exposed to potential danger from IEDs in Iraq"), difficulty concentrating, short term memory problems, hypervigilance (which was partly exacerbated by his job as a police officer), and exaggerated startle response. SER 244–245. And he reported that these symptoms caused him clinically significant distress or impairment in social, occupational, or other important areas of functioning. SER 245.

Dr. Shuman diagnosed Acosta with prolonged or chronic PTSD, meaning Acosta experienced symptoms

for more than 90 days since the trauma or since the beginning of symptoms. SER 237–238, 245. Dr. Shuman also opined that the severity of Acosta's illness made it moderately difficult for him to function in social, occupational, or other important areas and developed a treatment plan of individual psychotherapy. SER 237–238, 246–248. Dr. Shuman scheduled follow-up appointments for Acosta which he never attended. SER 247–248. Indeed, Dr. Shuman did not have any information that Acosta's symptoms or the PTSD had resolved. SER 248.

After his appointment with Dr. Shuman, Acosta submitted disability claims to the VA for PTSD, hearing loss and Traumatic Brain Injury. The claim was denied for failure to attend the prescribed therapy sessions. SER 97–98, 101–105. Notwithstanding the City's Fitness for Duty policy, imposing a duty to tell his employer if anything was impacting his ability to do his job, Acosta did not inform his employer about his symptoms or PTSD diagnosis, despite reporting that his symptoms were interfering with ability to do his job to the VA. SER 93–94, 96, 109–110, 226, 245, 275. Acosta testified, for the first time at trial, that he participated in peer counseling to address his PTSD symptoms; however, Acosta did not inform Dr. Shuman of this. SER 107–108, 248.

Board certified police and public safety psychologist, Dr. Kris Mohandie, qualified as an expert in police psychology and threat assessment. SER 20–22. Dr. Mohandie opined that Acosta's VA medical records showed anger and irritability—classic symptoms of

PTSD—that needed to be assessed to determine whether Acosta should be treated and not performing certain tasks until he received treatment. SER 23–24. Dr. Mohandie reviewed Acosta's Internal Affairs discipline record and opined that two incidents for which Acosta was disciplined were consistent with PTSD. SER 25–27. In 2010, another officer reported that Acosta drew his firearm and cursed at a citizen when she tapped on his patrol car window and asked for his badge number, consistent with the overreaction, low-frustration tolerance, and startle response symptoms of PTSD. SER 26–27. And in 2012, Acosta kicked the front door of a residence 5-10 times causing damage. He failed to report his actions, because he believed someone in the home had thrown a rock at his patrol car and he was "pissed off," demonstrating loss of emotional control, frustration tolerance, and relatively unprovoked aggression. SER 24–27, 40–41. Dr. Mohandie opined that an officer self-reporting Acosta's symptoms: raises the question of whether he is fit for duty, provides a reason for him being assessed for his fitness for duty, should be treated for his level of anxiety, and had a duty to report his symptoms to his employer. SER 29–32.

Dr. Mohandie opined that Acosta's records did not indicate his symptoms would have subsided or had been cured. He explained that chronic PTSD would not go away on its own, that without treatment symptoms would be likely to continue, and that several situations could be triggers for overreaction. SER 31–33. Dr. Mohandie based his opinions on Acosta's VA and IA

records and self-reported symptoms. He testified that although he had not personally examined Officer Acosta, he routinely provides his opinion based on information provided by third persons. SER 33–34, 37.

B. Proceedings Below

1. Acosta Failed to Preserve His Objections to the PTSD Evidence

Pre-trial, Acosta filed a motion *in limine* to exclude evidence regarding PTSD. ER 19–20, 29–31. He argued that this evidence was irrelevant, that the opinion testimony lacked foundation and was thus unreliable, and that any probative value was outweighed by the danger of unfair prejudice. *Id.* The District Court denied Acosta's motion "without prejudice though, because there is a lot of things that are involved in PTSD that may or may not be relevant as we move through. But for right now I'm denying it without prejudice." *Id.*; 976 F.3d at 993.

Despite the District Court's admonition that it was denying Acosta's motion "without prejudice," Acosta failed to lodge contemporaneous evidentiary objections of any kind at any point during trial, including during Jimenez or Shuman's testimony, or plaintiff's closing argument. ER 19–20, 31; SER 5–9, 85–88. Moreover, he did not raise concerns about the PTSD evidence in his post-trial motions.

Also pre-trial, Acosta lodged a *Daubert* challenge to Dr. Mohandie's opinion testimony, asserting that the

testimony was not reliable and lacked foundation with respect to how the 2011 PTSD diagnosis may have impacted him at the time of the incident, because Dr. Mohandie had not personally examined Acosta. ER 29–31. The District Court restated its conditional denial without prejudice. ER 31. Prior to Dr. Mohandie's trial testimony, Acosta re-stated the *Daubert* challenge as to the foundation of his opinions because it was based on Acosta's medical and discipline records and not by personally examining the officer. SER 10–19. During *voir dire*, Dr. Mohandie explained that examining a subject is one method in determining whether they have anger issues, but reviewing the behavior they demonstrate in the field is common and routine in evaluating potential work fitness issues. SER 13. Acosta never lodged a relevance or prejudicial objection to Dr. Mohandie's testimony during trial or in his post-trial motions. 976 F.3d at 1005.

The District Court denied the *Daubert* motion finding "[t]his information is within the standard practice of a person who is a psychologist," and expressly instructed Acosta's counsel, "I think that what happens here is just going to be a rigorous cross-examination, after there's been direct examination, and the jury can make a determination as to what weight they wish to give, if any, to this witness' testimony." SER 18–19.

2. Acosta's Trial Testimony was Impeached with Prior Inconsistent and Contrary Statements

Acosta's trial testimony revealed that he had provided several inconsistent statements regarding the shootings.

At the time of the incident, Acosta:

- Only mentioned to dispatch that shots had been fired and the suspect had a knife or scissors—not that he had been stabbed. SER 119–120.
- Did not mention that he and Sonny struggled over his gun to dispatch, the responding officers, or Sergeant O'Day who took his on-scene public safety statement. SER 119–120, 122, 124.
- Did not warn Provencio that Sonny had tried to disarm him of his gun or claim that Sonny was still armed when Provencio walked past Sonny who was not handcuffed. SER 128–129.
- Did not mention that Sonny dropped the scissors after the first shot. SER 124.

During the Post-Incident Interview, Acosta:

- Was represented by counsel and mentioned for the first time that he and Sonny fought over his gun. SER 121–122.
- Told investigators, for the first time, that Sonny dropped the scissors after the first shot. SER 123–124.

- Told investigators that Sonny fell after the first shot. SER 153.
- Told investigators that the struggle over the gun was so intense, he could not take a hand off his gun and risk being disarmed. SER 131.

During his Deposition, Acosta:

- Testified that Sonny violently tried to take his gun from him. SER 119.
- Did not mention that Sonny dropped the scissors between the two shots. SER 124.
- Testified that during the struggle over the gun he was able to take one hand off the gun to contact dispatch. SER 131.

During Trial, Acosta:

- Testified that that Sonny did not drop the scissors between the first and second shots. SER 124.
- Testified that after the first shot, Sonny advanced and took steps towards him, and that when he fired the second shot, Sonny was standing up. SER 124–125.
- First testified that Sonny grabbed the scissors with his left hand and approached him, and that when Sonny had a grip on the gun, he shot at his shin or leg area. ER 195–196.
- Changed previous testimony, after a lunch break, to say that Sonny grasped the scissors with his right hand. ER 204, SER 145–146.

3. The Jury's Verdict and Findings

The jury found for Mr. Lam on his Fourth Amendment, Fourteenth Amendment, Negligence (and apportioned 70% of the harm to Acosta), and Negligent Infliction of Emotional Distress (NIED) claims, but did not find a California Bane Act violation. ER 7–11.

The jury answered special interrogatories submitted with the verdict form, as follows:

> Question 1: Did Sonny Lam stab Officer Acosta with a pair of scissors? "Yes."
>
> Question 2: Did Sonny Lam grab Officer Acosta's firearm prior to Officer Acosta firing the first gun shot? "No."
>
> Question 3: Did Officer Acosta retreat from Sonny Lam after firing the first gunshot? "Yes."
>
> Question 4: Did Sonny Lam approach Officer Acosta with scissors before Officer Acosta with scissors before Officer Acosta fired his gun the second time? "No."

ER 12.

Based upon the answers to the special interrogatories, the jury expressly rejected Acosta's claims that he and Sonny engaged in a life and death struggle over Acosta's gun and rejected his claim that Sonny approached him holding scissors before he fired the second fatal shot.

4. Acosta Challenged the Verdict in Post-Trial Motions and on Appeal

After judgment was entered, Acosta filed a Rule 50(b) motion and Rule 59 motion asserting that his use of force was objectively reasonable, he lacked the requisite purpose to harm required for a due process violation, and he was entitled to qualified immunity. SER 308–355. Acosta did not and has not challenged the jury's finding of negligence against him. 976 F.3d at 995. The District Court denied Acosta's post-trial motions. ER 1–5.

The Ninth Circuit affirmed the District Court's finding that the Fourth Amendment violation was supported by sufficient evidence and that the constitutional right at issue was clearly established. 976 F.3d at 1003. The Ninth Circuit found that Acosta waived his right to appeal the District Court's evidentiary rulings by failing to object to the evidence at trial. 976 F.3d at 1005–06. And the Court found that it was not plain error for the District Court to admit evidence of Acosta's PTSD diagnosis. 976 F.3d at 1006–08. In addition, the Ninth Circuit found that there was insufficient evidence to support that Acosta acted with a purpose to harm unrelated to a legitimate law enforcement objective and revered the jury's verdict for Mr. Lam on the Fourteenth Amendment claim. 976 F.3d at 1003–04.

REASONS THE PETITION FOR CERTIORARI SHOULD BE DENIED

I. It was not Plain Error for the District Court to Admit the PTSD Evidence

A. The Decision of the Ninth Circuit not to Interfere with the Discretionary Choices of the District Court is not in Conflict with the Standard Applied in Other Circuits

This case presents a routine, fact-bound application of the generally accepted rule that a district court's evidentiary rulings at trial, including decisions on whether to admit expert testimony are afforded great deference, reviewed under an abuse of discretion standard, and will stand unless the decision is manifestly erroneous. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). In deference to a district court's familiarity with the details of the case and its greater experience in evidentiary matters, courts of appeals afford broad discretion to a district court's evidentiary rulings. *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 387 (2008) ("Rather than assess the relevance of the evidence itself and conduct its own balancing of its probative value and potential prejudicial effect, the Court of Appeals should have allowed the District Court to make these determinations in the first instance, explicitly and on the record.")

More importantly, because Acosta failed to object to the admission of the PTSD and/or so-called character evidence during trial or in his post-trial motions,

his claim was subject to the plain-error standard of review. *United States v. Olano*, 507 U.S. 725, 731 (1993) ("'No procedural principle is more familiar to this Court than that a constitutional right' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'") (internal citation omitted). "If an error is not properly preserved, appellate-court authority to remedy the error (by reversing the judgment . . . ,) is strictly circumscribed." *Puckett v. United States*, 556 U.S. 129, 134 (2009). "As a result '[a]ppellate decisions reversing a judgment in a civil case for plain error in applying Rules of Evidence are very rare.'" 976 F.3d at 1006 (citing C. Mueller & L. Kirkpatrick, Federal Evidence § 1:22 (4th ed. 2013)).

B. Acosta's PTSD Diagnosis and Symptoms Were Relevant to His Ability to Perceive the Situation He Confronted and to His Credibility in Reporting It

1. A Witness's Mental Health Condition is Relevant to Their Credibility

The Circuit Courts of Appeal have long recognized that a witness's mental condition is probative of their credibility as a witness. *United States v. Butt*, 955 F.2d 77, 82–83 (1st Cir. 1992) ("Evidence about a prior condition of mental instability that "provide[s] some significant help to the jury in its efforts to evaluate the witness's ability to perceive or to recall events or to testify accurately" is relevant."); *United States v. Sasso*, 59

F.3d 341, 348 (2d Cir. 1995) (concluding that a witness's psychological problem is relevant to credibility if it "may have affected her 'ability to perceive or recall events or to testify accurately.' "); *United States v. Society of Indep. Gasoline Marketers of Am.*, 624 F.2d 461, 469 (4th Cir. 1979) (finding abuse of discretion when a district court precluded evidence that a witness was, at the time of events in question, being treated for mental illness rendering him delusional and hallucinatory); *United States v. Partin*, 493 F.2d 750, 762 (5th Cir. 1974) ("the jury should, within reason, be informed of all matters affecting a witness's credibility. . . ."); *United States v. Lindstrom*, 698 F.2d 1154, 1165–66 (11th Cir. 1983) ("The cumulative evidence of the psychiatric records suggests that the key witness was suffering from an ongoing mental illness which caused her to misperceive and misinterpret the words and actions of others").

Acosta does not identify a split amongst the Circuits on this issue, nor could he, as the Circuit Courts have adopted a multi-factor test to assess whether past mental health issues are permissible to impeach a witness's credibility. "In assessing the probative value of such evidence, [a] court should consider such factors as the nature of the psychological problem, the temporal recency or remoteness of the [mental condition], and whether the witness suffered from the problem at the time of the events to which she is to testify, so that it may have affected her ability to perceive or to recall events or to testify accurately." *United States v. Sasso*, 59 F.3d at 347. Several Circuit Courts have adopted

this same fact-bound inquiry. *See, e.g.*, *United States v. Love*, 329 F.3d 981, 984 (8th Cir. 2003); *Boggs v. Collins*, 226 F.3d 728, 742 (6th Cir. 2000); *United States v. Kohring*, 637 F.3d 895, 910–11 (9th Cir. 2011); *United States v. Franklin*, 82 Fed.Appx. 24, 26 (10th Cir. 2003).

As this Court has explained, "deference" is the hallmark of abuse of discretion review. *General Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997). The Courts of Appeal do not reverse evidentiary rulings unless the rulings are "manifestly erroneous and prejudicial." *Id*. Here, the District Court did not abuse its discretion in allowing evidence of and expert testimony regarding Petitioner's PTSD diagnosis and expert testimony regarding his diagnosis and the Ninth Circuit correctly did not disturb this finding.

2. Acosta's Ability to Accurately Perceive Events and Credibly Report Them Was a Central Issue at Trial

The pivotal issue at trial was what Acosta perceived just prior to his uses of force; thus, his credibility and ability to recall were directly at issue. In cases "where what the officer perceived just prior to the use of force is in dispute, evidence that may support one version of events over another is relevant and admissible." *Boyd v. City and County of San Francisco*, 576 F.3d 938, 944 (9th Cir. 2009) (citing *Graham v. Connor*, 490 U.S. 386, 399, n. 12 (1989) (indicating that a fact-finder may consider outside evidence "in assessing the

credibility of an officer's account of the circumstances that prompted the use of force").

a. Acosta's Diagnosis and Symptoms Were Relevant to his Credibility

Acosta self-reported having symptoms of forgetfulness, irritability, poor frustration tolerance, and having flashbacks of traumatic events from his service in Iraq including reliving the experience, illusions, hallucinations, and dissociative flashback episodes which were sometimes triggered by clearing houses and drawing his weapon. SER 222–226, 241–242. Certainly, these psychological problems "may have affected [Acosta's] ability to perceive or recall events or to testify accurately," and are relevant to his credibility. *Sasso*, 59 F.3d at 348.

Acosta's trial testimony was severely impeached by his varying inconsistent statements and concerning omissions. Acosta testified that Sonny struggled mightily to take his gun which caused him to fire the first shot; however, Acosta did not report a struggle over his gun to dispatch or any of the officers that responded to the scene. SER 119–120, 122, 124. Acosta told investigators that Sonny dropped the scissors after the first shot and failed to inform the responding officers that Sonny may still be armed, but he denied that Sonny dropped the scissors between the shots at trial. SER 124, 128–129. During the trial, Acosta testified variously that Sonny approached him with the scissors in his left hand and then after a lunch break

changed his testimony to say that Sonny grasped the scissors with his right hand. ER 204, SER 145–146. Acosta's varying versions of the shootings and conspicuous omissions in reporting implicates his ability to recall the event. Indeed, Acosta's PTSD symptoms may well account for his apparent inability to recall the details of the shootings.

Acosta's credibility is also implicated by his failure to report his symptoms and PTSD diagnosis to his employer in violation of the City's Fitness for Duty Policy, particularly since he reported to Dr. Shuman that his symptoms did interfere with his work. SER 109–110, 226, 245, 275.

b. Acosta's PTSD Diagnosis Was Not "Remote" and the Jury Could Find it Persisted to the Time of the Shooting

Acosta's primary contention is that it was plain error to admit evidence of a "remote" PTSD diagnosis to attack his credibility when there was no evidence that he suffered from PTSD or any symptoms at the time of the incident. Acosta is mistaken that there was no evidence that he suffered from PTSD at the time of the shooting.

Acosta testified that he sustained physical and emotional injuries during his deployment in the Iraq war and had been experiencing symptoms since his return home in 2007. SER 155. In 2010, a fellow officer reported that Acosta drew his firearm and cursed at a

citizen when she tapped on his patrol car window and asked for his badge number, consistent with the overreaction, low-frustration tolerance, and startle response symptoms of PTSD. SER 26–27. Acosta testified that he had been experiencing symptoms intensely for a year prior to seeking help from the VA in 2011. SER 155. In February 2011, VA Nurse Practitioner Jimenez, consulting with a VA psychiatrist, determined that Acosta suffered from PTSD. SER 227–231. In June 2011, Dr. Shuman diagnosed Acosta with prolonged or chronic PTSD and proscribed individual psychotherapy sessions. SER 237–238, 245. Dr. Mohandie testified that Acosta's symptoms would not abate on their own and would likely persist without treatment. SER 31–33. In 2012, Acosta kicked the front door of unoccupied home 5 to 10 times suggesting a loss of emotional or frustration tolerance and relatively unprovoked aggression, which Dr. Mohandie testified could be consistent with PTSD. SER 107–108, 248. Acosta shot and killed Sonny Lam on September 2, 2013.

Acosta had an incident consistent with PTSD or an outright diagnosis in each of the three years prior to the shootings. Thus, it was reasonable for the jury to infer that Acosta's symptoms persisted at the time of the shooting. *See, e.g.*, *United States v. Lindstrom*, 698 F.2d at 1165–66 ("The cumulative evidence of the psychiatric records suggests that the key witness was suffering from an ongoing mental illness which caused her to misperceive and misinterpret the words and actions of others").

c. The Ninth Circuit Correctly Joined its Sister Circuits on this Issue

The Ninth Circuit properly determined that Acosta's diagnosis of PTSD two years prior to the shooting was not too remote to be admissible. Other circuits have found mental conditions relevant from two to ten years following diagnosis. *See, e.g.*, *United States v. Love*, 329 F.3d at 984 (finding that "the temporal gulf—five years—between Thomas's diagnosis and the events that he observed is not of sufficient duration to eclipse the relevancy of the inquiry. . . .")[3]; *United States v. Smith*, 77 F.3d 511, 516–17 (D.C. Cir. 1996) (indicating that evidence of severe depression about two years earlier could be admissible); *Boggs v. Collins*, 226 F.3d 728, 742 (6th Cir. 2000) (allowing cross-examination on hospitalization for mental infirmity six or seven years before the events in question, where the party had been undergoing treatment in the years since the hospitalization, and the condition was improving).

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[3] Petitioner argues that the *Love* Court noted that the witness suffered from a memory impairment condition "since 1996" and "therefore" found the temporal remoteness did not eclipse its relevance. (Pet. 15–16.) This is an overreach. In *Love*, the government "note[d] that [at trial Love] never attempted to ask [the witness] if he was presently experiencing short or long term memory problems or had experienced such problems at the time of the events in question." *United States, Appellee, v. Deon Love, Appellant*, 2002 WL 32390541 *21 (8th Cir. 2002). As such, the government in *Love* argued just as Petitioner does here—i.e., there was no evidence of contemporaneous suffering.

Acosta cites to inapposite authorities. In *United States v. Antone*, 981 F.2d 1059, 1061 (9th Cir. 1992), the court held the district court did not abuse its discretion by refusing to release the witness's psychiatric records, because the court found that nothing in them that supported the defendant's theory that her testimony was fabricated or that she suffered from any psychosis and the witness admitted in her testimony to seeing a counselor on and off since grade school. In *United States v. Kohring*, 637 F.3d at 910–11, the court found the evidence withheld concerning the witness's alleged mental instability was immaterial because it was based on an FBI special agent's informal assessment—not a formal professional diagnosis as here.

Thus, it was not plain error for the District Court to admit the PTSD evidence.

3. Acosta Did Not Preserve His Evidentiary Challenges for Appeal and Was Entitled to Relief on Appeal Only if There Was Plain Error

Acosta moved in limine to exclude all evidence of his PTSD diagnosis and lodged a *Daubert*[4] challenge to the foundation of any expert opinion testimony concerning it. ER 29–30. The District Court denied the motion in limine "*without prejudice*." ER 19–20. That is,

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[4] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

the District Court invited Acosta to renew his objection at trial.

Acosta failed to lodge contemporaneous objections when evidence of his PTSD diagnosis was presented to the jury, and failed to address the admission of this evidence in his post-trial motions. *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013) ("To preserve a claim of error in the admission of evidence, a party must timely object to or move to strike the evidence. Fed. Rule Evid. 103(a)(1)."). Similarly, Acosta failed to object to Mr. Lam's counsel's discussion of the PTSD evidence during closing argument—despite his vehement claims that it was improper in his instant Petition. *Henderson v. United States*, 568 U.S. 266, 276 (2013) ("Counsel cannot rely upon the 'plain error' rule to make up for a failure to object at trial.").

Far from objecting to the PTSD evidence (and the purported improper argument thereon) at trial, Acosta made the tactical decision to join issue with the significance of the PTSD evidence. During his testimony, Acosta denied that the symptoms he was feeling and for which he sought treatment from the VA made performing his duties as an officer difficult. SER 96–99, 109–110. He claimed that no one at the VA told him that he was unfit for his duties as a police officer. SER 152. Moreover, Acosta provided other reasons for some of his symptoms; for example, he intimated that his sleeplessness and resulting irritability was due to working the graveyard shift and trying to sleep during the day with his infant and toddler in the house. SER 149–152. During closing arguments, Acosta's counsel

touted Acosta's public service during his time in the military "serv[ing] our country in one of the most dangerous places in the world," and challenged Lam's counsel's argument regarding Acosta's credibility. SER 210–214.

Similarly, Acosta lodged a *Daubert* challenge only to the foundation of Dr. Mohandie's opinions, claiming that they were unreliable because Dr. Mohandie did not personally examine Acosta. ER 29–30; SER 14–15. The District Court properly determined that Acosta's *Daubert* challenge went to the weight of the evidence not its admissibility and instructed Acosta's counsel to rigorously cross-examine Dr. Mohandie. SER 18–19; *see Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1231 (9th Cir. 1998). Indeed, Acosta established that Dr. Mohandie did not personally examine him and that he did not know what treatment the officer may have received via peer counseling. SER 35–39.

4. Evidence that Acosta Suffered from PTSD Was Not Improper Character Evidence Governed by FRE 404

Acosta did not object to Dr. Mohandie's testimony as improper character evidence during trial or in his post-trial motions and lodged this argument for the first time on appeal. 976 F.3d 1004–05. Acosta argues that the PTSD evidence constituted inadmissible character evidence under Fed. Rule Evid. 404(a)(1).

A violation of Rule 404 requires two things: (1) that evidence is used for a propensity purpose, and (2) that

the evidence is of a person's "character" or "character trait." That evidence of mental illness may support a propensity argument does not automatically render it character evidence within the meaning of Rule 404. Acosta cites no case holding that evidence of PTSD is evidence of character or a character trait, and Respondent is not aware that any such case exists. Mental illness is not usually considered a character trait. "Character" ordinarily refers to traits that are "subject to a significant degree of moral condemnation or approval." Wright & Miller, Fed. Prac. & Proc. Evid. § 5233.

There is no clear answer in the case law to the general question of whether evidence of a mental state may properly be considered character evidence. *Id*. § 5233.2. Acosta did not make such an argument at trial and therefore the Ninth Circuit properly declined to consider the issue on appeal. *United States v. Olano*, 507 U.S. at 731. It would be inappropriate for this Court to consider whether evidence of PTSD constitutes character evidence as a matter of first impression without a fully developed record on the issue.

5. The District Court's Decision to Admit Evidence of PTSD was not Manifestly Erroneous

Plain error requires an error that is plain or obvious and so prejudicial that it affects the party's substantial rights such that review is necessary to prevent

a miscarriage of justice. *United States v. Olano*, 507 U.S. at 733–34.

Any error in admitting the PTSD evidence did not constitute a miscarriage of justice warranting plain error reversal. Acosta shot and killed a mentally ill, incapacitated, unarmed man in his own home. His account of why he did so was inconsistent and contrary to important physical facts. The jury was free to disbelieve all of Acosta's testimony, simply based on his multiple prior inconsistent statements. *United States v. Hale*, 422 U.S. 171, 176 (1975). It is axiomatic that an officer's self-serving testimony does not have to be accepted particularly when it is inconsistent with the physical evidence. *Ralston Purina Co. v. Hobson*, 554 F.2d 725, 728–29 (5th Cir. 1977). Here, the jury found that Acosta retreated from Sonny after the first shot and that Sonny was unarmed at the time of the second shot. The bullet path evidence reveals that Sonny was not upright or facing Acosta at the time of the fatal shot. Thus, the jury's findings are amply supported by evidence "that had no relation to the PTSD diagnosis." 976 F.3d at 1007.

There is no merit to Acosta's concern that the admission of PTSD evidence will have a chilling effect on the law enforcement industry. Acosta self-reported troubling pre-existing symptoms that he was experiencing. He admitted they interfered with his work and he sought disability benefits for them. He was diagnosed with PTSD and proscribed a treatment plan. He never reported those symptoms or diagnosis to his employer, in violation of his duty to do so, and he failed to

provide evidence that he ever sought treatment for any of it. This situation is wholly distinct from that of an officer seeking mental health treatment and being stigmatized for getting help.

II. The Ninth Circuit Properly Affirmed the District Court's Denial of Qualified Immunity to Acosta Because the Facts as Found by the Jury Reveal He Committed a Clearly Established Constitutional Violation

In his attack on the denial of qualified immunity, Acosta does not identify a conflict among the Circuits. Instead, Acosta accuses the Court of Appeals of defining the applicable law at a high level of generality in violation of this Court's qualified immunity jurisprudence. Acosta dismisses the Ninth Circuit's detailed and specific qualified immunity analysis as "providing nothing more than a rephrasing of the general right to be free from excessive force." Pet. 23. This claim ignores the opinion's express language that "an officer violates a clearly established right when he shoots an incapacitated suspect who no longer poses a threat, even if the suspect previously had a weapon and stabbed an officer." 976 F.3d 998. Acosta's misrepresentation of the basis of the Court of Appeals decision is fatal to his petition for certiorari.

Moreover, Acosta's claim that the Ninth Circuit erred in applying the law is based on a view of the facts that is favorable to him. The Court of Appeals correctly

allowed the jury's view of the facts to govern its analysis. *Berry v. United States*, 312 U.S. 450, 453 (1941) (holding the jury is the "constitutional tribunal provided for trying facts in courts of law"). In reviewing the District Court's denial of Acosta's Rule 50(b) motion, the Ninth Circuit could "not make credibility determinations or weigh the evidence . . . and [] must disregard all evidence favorable to the moving party that the jury is not required to believe" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150–51 (2000).

Drawing all reasonable inferences in Mr. Lam's favor, Acosta retreated from Sonny after the first shot, Sonny was unarmed and incapacitated, and not a threat to Acosta at the time of the second and fatal shot. 976 F.3d at 991, 994.

A. The Circuit Courts Uniformly Determine the Reasonableness of an Officer's Actions Based on the Information Possessed by the Officer at the Moment that Force is Employed, Even if Force was Justified at an Earlier Point During the Interaction

In support of its conclusion that the law was clearly established that shooting an incapacitated, unarmed person who no longer posed a threat violated the Fourth Amendment rights of the victim, the Ninth Circuit relied on its own relevant authorities and supporting decisions from other Circuits. The Circuit Courts are united in this assessment of ongoing force.

Hopkins v. Andaya, 958 F.2d 881, 887 (9th Cir. 1992) (an initial round of shots could be justified because the suspect took the officer's baton and beat him with it, but the officer did not act reasonably when he fired a second round of shots after the suspect "had been wounded and was unarmed"); *Zion v. County of Orange*, 874 F.3d 1072, 1075–76 (9th Cir. 2017) (a shooting that occurred the same month of the instant shooting found unreasonable on the basis of prior cases)[5]; *Estate of Jones by Jones v. City of Martinsburg*, 961 F.3d 661, 668–70 (4th Cir. 2020) (denying qualified immunity in 2013 incident where officers fatally shot suspect after he ceased to pose a threat, when he had previously hit and stabbed an officer); *Estate of Smart by Smart v. City of Wichita*, 951 F.3d 1161, 1175 (10th Cir. 2020) (denying qualified immunity in a 2012 incident when officer fatally shot a person whom police suspected had been an active shooter after suspect no longer posed a threat); *Harris v. Pittman*, 927 F.3d 266, 281 (4th Cir. 2019) (qualified immunity denied as to officer's second shot in 2012 incident after the officer had already wounded and disabled the suspect with the initial shot); *Fancher v. Barrientos*, 723 F.3d 1191, 1201 (10th Cir. 2013) (denying qualified immunity when officer fired fatal shots after suspect was no longer a danger following the suspect's initial assault on the officer); *Brockington v. Boykins*, 637 F.3d 503, 507 (4th

[5] Petitioner ignores the fact that the Court of Appeals did not rely on *Zion* to give notice of the law to Acosta, but relied on the precedent on which the *Zion* opinion was based.

Cir. 2011) (qualified immunity denied as to subsequent shots fired at a wounded suspect).

Other decisions from the Circuit Courts are in accord. The Eleventh Circuit has said, reviewing a shooting that took place in December 2013, "The use of deadly force against a suspect who, though initially dangerous, has been disarmed or otherwise become non-dangerous, is conduct that lies 'so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct [is] readily apparent.'" *Hunter v. Leeds, City of*, 941 F.3d 1265, 1281 (11th Cir. 2019) (citation omitted). The Fourth Circuit has explained, "To simply view all of the force employed in light of only the information possessed by the officer when he began to employ force would limit, for no good reason, the relevant circumstances to be considered in judging the constitutionality of the officer's actions." *Waterman v. Batton*, 393 F.3d 471, 481–82 (4th Cir. 2005) ("hold[ing] that force justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated). *See also McCoy v. Meyers*, 887 F.3d 1034, 1050 (10th Cir. 2018) (denying qualified immunity for force used within seconds of "effectively subdu[ing]" a previously armed suspect who also reached an officer's firearm); *Ellis v. Wynalda*, 999 F.2d 243, 247 (7th Cir. 1993) (finding "although Wynalda could have shot Ellis during their physical encounter . . . , Wynalda had no reasonable fear of Ellis after he backed away and ran"); *Dickerson v. McClellan*, 101 F.3d 1151, 1162 n. 9 (6th Cir. 1996) (noting that analyzing separate segments

of single encounter may be appropriate if "the officers' initial decision to shoot was reasonable under the circumstances but there was no need to continue shooting").

Acosta claims that specific facts in each of the cases relied upon by the Ninth Circuit are sufficiently different from the instant case to vitiate notice to Officer Acosta that his second shot would violate Sonny's rights. For example, Acosta urges that the time between the volley of shots in *Hopkins* renders the case inapposite. Acosta misses the point. The amount of time between shots is not dispositive, the relevant inquiry is whether the officer had a meaningful opportunity "to recognize and react to the changed circumstances." *Waterman*, 393 F.3d at 481. The evidence and the jury's findings indicate that Acosta had time to recognize and react to the changed circumstances: After the first shot, Acosta interacted with Mr. Lam explaining that Sonny had a knife and cleared a jam in his gun with the "tap, rack, and roll" method, all while retreating from Sonny. 976 F.3d 992, 998.

Several Circuit Courts have found clearly established violations under similar fast-paced circumstances. *See, e.g.*, *Ellison v. Lesher*, 796 F.3d 910, 914, 916–17 (8th Cir. 2015) (finding, as of December 2010, an officer used unreasonable deadly force against an empty-handed suspect who—despite having pushed the officers and wielded a cane in his own home just prior—was unarmed and did not pose a threat of imminent harm at the time she fired her gun); *Fancher v. Barrientos*, 723 F.3d at 1201 (denying qualified

immunity for shots two through seven when the officer saw the suspect slump and took a few steps back after the first shot, all within seconds and following the suspect's initial assault on the officer).

Acosta further attempts to distinguish these and other authorities by asserting that they all involve suspects who either fell to the ground or became clearly incapacitated. Pet. 26–28. This purported distinction is unavailing.

The trajectory of the fatal bullet in Sonny's body showed that at the time of the second shot, Sonny, who had already been shot in the leg, could not have been standing upright and was substantially lower than Acosta—either stumbling, crouching, falling to the ground, or already on the ground—such that Acosta stood over him and shot him. Sonny was obviously incapacitated. Considering these facts, the jury specifically found that Acosta's conduct was not only in violation of the Fourth Amendment, but "malicious, oppressive, or in reckless disregard of [Sonny's] rights." ER 7–11. Here again, Acosta urges a view of the facts that is not consistent with the jury's findings and runs afoul of this Court's directive to "disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. at 150–51. Acosta's testimony that he shot Sonny the second time straight on and chest high was belied by the physical evidence and cannot be the basis of a proper argument on his behalf. Moreover, several Circuit Courts have denied qualified immunity for the continued use of force on suspects

that have been disarmed but are still standing or upright. *See, e.g.*, *Ellison v. Lesher*, 796 F.3d at 916–17 (shooting mentally ill man as he stood in his home unarmed, after altercation where suspect pushed officers and wielded a cane), *Ellis v. Wynalda*, 999 F.2d at 247 (shooting suspect after their altercation as he backed away and ran); *Fancher v. Barrientos*, 723 F.3d at 1201 (shooting suspect after having already shot suspect, seeing him slump, and officer took three steps backwards); *Salvato v. Miley*, 790 F.3d 1286, 1293 (11th Cir. 2015) (shooting suspect after altercation after he retreated and was unarmed).

B. The Level of Identity in Precedential Cases Demanded by Petitioner is Excessive and Does Not Reflect Real World Decision-Making by Police

This Court has established that a prior opinion with the same facts is not necessary to clearly establish the law. *Hope v. Pelzer*, 536 U.S. 730 (2002); *Taylor v. Riojas*, 141 S.Ct. 52 (2020). Qualified immunity analysis should be more than "a scavenger hunt for prior cases with precisely the same facts." *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007).

Recently published research demonstrates that the level of identity in precedential cases demanded by Acosta is not realistic and is divorced from the decision-making that is in fact engaged in by police

officers.[6] Prof. Schwartz engaged in exhaustive empirical research of police training regarding the use of force in California, including review of use of force policies, police department policy manuals, training materials, relevant materials from Lexipol LLC (which provides policies and trainings to 95% of California law enforcement agencies), California POST (which sets minimum standards for training), videotapes, PowerPoint presentations, newsletters, materials used to train the officers who train other officers, and the practices of district attorneys and city attorneys. She also consulted with national police practices experts.

The research demonstrated that, across the board of various forms of training, officers are taught watershed decisions like *Graham* and *Garner*[7] but are not informed about lower court decisions interpreting the Supreme Court cases in different factual scenarios.[8] Even in the very rare circumstances when training materials do reference a lower court decision, they do not educate officers about the facts and holdings of the case, but are used to establish broad principles, such as that an officer does not have to use the least force possible as long as the force was reasonable.[9] Prof. Schwartz's research constituted "unequivocal proof that officers are not notified of the facts and holdings of cases that clearly establish the law for qualified

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[6] Joanna C. Schwartz, *Qualified Immunity's Bold Lie*, 88 U.Chi.L.Rev. 605 (2021).

[7] *Tennessee v. Garner*, 471 U.S. 1 (1985).

[8] Schwartz, at 610.

[9] *Id.*, at 610, 649–51, 656–57, 663–64.

immunity purposes."[10] Police officers are never taught or trained on the cases that lawyers and judges refer to in qualified immunity arguments, much less do they engage in the sort of hair-splitting analysis advanced by Acosta.

Prof. Schwartz's research casts serious doubt about the validity of current qualified immunity jurisprudence. It is not necessary, however, to resolve issues about the continued vitality of the qualified immunity doctrine to adjudicate the instant petition for certiorari.

The principal focus of the qualified immunity inquiry is whether an officer had notice that his behavior violated the Constitution. *Anderson v. Creighton*, 483 U.S. 635, 646 (1987) (qualified immunity is "intended to provide government officials with the ability 'reasonably [to] anticipate when their conduct may give rise to liability for damages' "); *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) ("the focus is on whether the officer had fair notice that her conduct was unlawful").

Prof. Schwartz's research disclosed that police officers are trained to apply the general principles of *Graham* and *Garner* "in the widely varying circumstances that come their way," without reference to lower court cases interpreting those principles.[11] Although this Court's qualified immunity cases have rejected the notion that *Graham* and *Garner* provide

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[10] *Id.* at 605.

[11] *Id.* at 605, 643, 658, 676–77.

sufficient notice of applicable principles to police officers, that does not mean that Acosta's extreme hair-splitting approach to precedent is required. The important inquiry is "whether the violative nature of particular conduct is clearly established." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015).

In considering whether Acosta had sufficient notice of clearly established law in the instant case, we should focus on the most salient fact confronting the officer, that the subject he was confronting had already attacked him with a weapon. Surely that was the officer's principal concern. And that was the fact primarily addressed by the case law relied upon by the Ninth Circuit to clearly establish the guiding principle "that an officer may not shoot a previously armed person who no longer posed a threat," 976 F.3d at 1000. To the extent the law assumes, despite the evidence to the contrary, that officers may be aware of pre-existing precedent in a critical moment, this principle is sufficiently particular. It was surely enough to inform the decision-making of an officer armed with weapons other than deadly force, as he faced a mentally ill, seriously wounded, unarmed man, stumbling toward him. Acosta had ample reason to know that shooting Sonny Lam under these circumstances would violate his constitutional rights, and adequate means other than deadly force to resolve the situation.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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