

No. 25-660

IN THE
Supreme Court of the United States

NICOLE KLUM, ESTATE OF BOBBY JO KLUM, *et al.*,

Petitioners,

v.

CITY OF DAVENPORT, IOWA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondents disagree with Petitioners' question presented. Petitioners never argued at the district court level that the Second Amendment or Iowa law permitting the open carry of firearms prohibited Officer Roth's use of deadly force. It is axiomatic that an argument cannot be considered on appeal that was not first raised and ruled upon in the court below. The accurate question presented, then, is: did Petitioners properly preserve error on their argument that the decision below conflicts with the Second Amendment and Iowa law permitting the open carry of firearms? The answer to this question is "no," and the Petition for Writ of Certiorari should be denied on that basis alone. But even if Petitioners preserved error, the answer to the question of whether the Second Amendment or Iowa law permitting the open carry of firearms prohibited Officer Roth's use of deadly force is still "no."

In an effort to avoid this unmistakable conclusion, Petitioners broadly frame the legal question presented in this case with a level of generality that it is unhelpful and divorced from reality. Petitioners frame this case as one involving a law enforcement officer who shot and killed an individual merely for holding a gun to his own head. Nothing could be further from the truth. The proper question preserved for review is: whether an officer is entitled to qualified immunity for using lethal force against a subject armed with a handgun who evaded law enforcement officers on foot through a residential neighborhood for over 12-minutes, ignoring numerous lawful commands to stop and drop his weapon, and failing to respond to less

lethal force used against him, when the subject suddenly changed course and began moving towards a group of innocent bystanders who were within firing range of the subject's handgun. As the district court and Eighth Circuit Court of Appeals unequivocally recognized, the answer is "yes."

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STATEMENT

Bobby Jo Klum was a convicted sex offender who had a long history of felony convictions and served multiple stints in jail. Resp. App. 23a–26a, 28a–31a. In the afternoon of October 13, 2021, Davenport Police Officer Dustin Mooty went to Klum’s house to conduct a warrant check, as Klum had an outstanding warrant for his arrest. Pet. App. 2a, 19a. Officer Mooty observed Klum in the backyard, turned on his emergency lights and “chirped” his siren. Pet. App. 2a, 19a. Klum immediately fled on foot and Officer Mooty pursued him through the residential neighborhood. Pet. App. 2a, 19a. While chasing Klum, Officer Mooty reported over his radio that he was in pursuit. Pet. App. 2a, 20a. Officer Mooty repeatedly instructed Klum to stop and advised Klum he had a warrant for his arrest. Pet. App. 2a, 20a. Klum disobeyed Officer Mooty’s commands and did not stop. Pet. App. 2a, 20a.

While still in pursuit, Officer Mooty observed Klum turning towards him multiple times and holding a gun to his head. Pet. App. 2a, 20a. Officer Mooty reported over the radio that Klum had a gun to his head. Pet. App. 2a, 20a. Officer Mooty commanded Klum to get on the ground, but Klum did not comply and continued fleeing through the residential neighborhood while holding the gun to his head. Pet. App. 2a, 20a. Other officers arrived at the scene to assist in the pursuit of Klum. Pet. App. 2a–3a, 20a.

For the next 12 minutes, Klum led officers on a foot pursuit throughout the residential neighborhood. Pet. App. 3a. During that time, multiple officers ordered Klum to stop and put down his gun. Pet. App. 3a, 21a.

Klum refused to do so. Pet. App. 3a, 21a. Davenport Police Officer Mason Roth joined the pursuit and first encountered Klum when Klum was walking down an alley with his gun still in hand. Pet. App. 3a, 21a. Officer Roth ordered Klum multiple times to put his hands up and drop the gun. Pet. App. 3a, 21a. Klum refused to do so. Pet. App. 3a, 21a.

Instead, Klum exited the alleyway and walked south onto the western sidewalk of Iowa Street away from the officers. Pet. App. 3a, 21a–22a. As Klum did so, officers followed Klum and yelled at nearby bystanders to get out of the street and to go inside. Pet. App. 3a, 23a. Officers repeatedly commanded Klum to drop his gun. Pet. App. 3a. Klum refused to comply and continued walking south on the western sidewalk of Iowa Street past 9th Street while holding his gun to his head. Pet. App. 3a, 23a.

As Klum did so, bystanders were still present on the east side of Iowa Street. Pet. App. 3a–4a, 22a–23a. Because Klum was armed and continued to refuse to surrender and comply with commands, Davenport Police Officers Angela Jarrin and Robert Welch each fired rubber bullets at Klum. Pet. App. 3a, 23a–24a. Officer Welch's round struck Klum's torso but had no effect. Pet. App. 3a, 24a. Officers again ordered Klum to drop his gun and stop walking, but Klum refused and kept walking away from officers. Pet. App. 3a, 24a.

Seconds after the last rubber bullet was fired, Klum changed his path and began crossing the street toward the east side of Iowa Street, between 9th Street and 8th Street, where bystanders were located. Pet. App.

4a, 6a, 24a. Klum was again ordered to drop the gun and to stop. Pet. App. 4a, 24a. He did not do so. Pet. App. 4a, 24a. Before Klum got to the eastern sidewalk of Iowa Street, Officer Roth fired one shot, striking Klum. Pet. App. 4a, 24a.¹

Petitioners omit much of the above undisputed facts. Petitioners also misrepresent many facts found to be undisputed by the courts below.

First, Petitioners claim that Klum's weapon was only a BB gun. Pet. 2. But the district court found Petitioners' contention that Klum was holding a BB gun was not supported by the record. Pet. App. 22a. Further, Petitioners conceded it was reasonable for

¹ Officers' pursuit of Klum was captured on police body camera, cruiser dash cameras, and bystander videos. These videos were submitted into the record before the district court and Eighth Circuit. Officer Roth's body camera footage can be viewed here: <https://lanewaterman.sharefile.com/public/share/web-sf65bc079afad48bb91e559151bd0c24f>. Officer Mooty's body camera footage can be viewed here: <https://lanewaterman.sharefile.com/public/share/web-s27908437ef704194963b5ac14dcd27ce>. Other responding officers' body camera and dash camera footage can be viewed here: <https://lanewaterman.sharefile.com/public/share/web-sb636c534dfc94a91b38eab29526005b0>; <https://lanewaterman.sharefile.com/public/share/web-sc402e88437a8486f945c789b42a05888>; <https://lanewaterman.sharefile.com/public/share/web-s9e0a0c4a3756405ba88b4356df455550>; <https://lanewaterman.sharefile.com/public/share/web-s8661fe0fdb6245158b7d0c92f9878a36>. Two bystander videos can be viewed here <https://lanewaterman.sharefile.com/public/share/web-s0bc2bffa9f9a4a10b98aba9eb4329bcf>; <https://lanewaterman.sharefile.com/public/share/web-s7171c41ae66a40659a6860927fc4a5a4>.

Officer Roth to perceive that Klum was holding a real handgun. Pet. App. 22a. Petitioners did not challenge the district court's findings to the Eighth Circuit, and the Eighth Circuit did not address Petitioners' assertion that Klum was holding only a BB gun because it was not raised.

Second, Petitioners claim "[i]t is undisputed that at the time Klum was killed all bystanders were in or near the house on the corner." Pet. 4. Petitioners cite the Eighth Circuit's opinion as support for their claim. Pet. 4 (citing Pet. App. 6a). The Eighth Circuit, however, found the very opposite based on the undisputed video footage of the incident. The Eighth Circuit found, as the video footage plainly depicted, that "[d]espite the officers' commands, several bystanders remained outside." Pet. App. 4a. The Eighth Circuit further correctly found that the video footage shows Klum falling to the ground after being shot "as several bystanders remained outside." Pet. App. 6a. Indeed, the video footage depicts bystanders outside and near Klum before, when, and after Klum was shot. Further, it is undisputed that the bystanders were within lethal range of a shot fired from Klum's handgun. Pet. App. 11a. Bystanders are certainly not inside and covered if they are within firing range of a weapon.

Third, Petitioners claim it is "undisputed" that when Klum was shot, "Klum was neither closer to the bystanders, nor walking more directly toward them." Pet. 2–3. As the district court and Eighth Circuit found, this assertion is simply false in view of the undisputed video evidence. The Eighth Circuit found that the video footage showed Klum turning to move

towards the bystanders moments before he was shot. Pet. App. 6a. Indeed, the Eighth Circuit found that Petitioners' assertion that Klum did not turn towards the bystanders or was moving away from the bystanders to be "unreasonable given what the video footage shows." Pet. App. 6a. No reasonable person would disagree with the conclusion that the video footage shows Klum changing his direction and moving towards bystanders moments before he was shot.

Fourth, Petitioners claim that none of the dozens of other officers present "concluded that the use of deadly force was justified." Pet. 12. There is nothing in the record to support Petitioners' claim. Just the opposite. The ample video footage of the incident shows numerous officers armed with lethal weapons pointing them at Klum. Deputy Anthony Johnson, another responding officer from a different department, testified that when Klum began to cross the street, Deputy Johnson tracked him with his rifle and was about to fire at Klum, but Officer Roth shot first. Resp. App. 17a–18a. Deputy Johnson testified he was so close to firing at Klum, that at first he thought he was the one who fired the shot. Resp. App. 17a–18a.

REASONS FOR DENYING CERTIORARI

I. Petitioners failed to preserve error on their argument concerning the Second Amendment and Iowa law permitting the open carry of firearms.

In their Petition, Petitioners attempt to morph this case into one involving a question of the Second Amendment and the right to carry a firearm.

Petitioners claim this case “raises a significant question of federal law regarding the constitutional protections afforded to gun owners.” Pet. 8. But this question suffers a fatal flaw: it was not raised or decided in the underlying proceedings, so Petitioners failed to preserve error rendering this Court unable to address the question.

Petitioners cannot point to a single reference in their pleadings and arguments to the district court regarding the Second Amendment or Iowa statutes permitting the open carrying of a weapon. This Court should follow its well-settled rule that it “will not decide questions not raised or litigated in the lower courts.” *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987).

Assuming *arguendo* that Petitioners preserved and argued below that the Second Amendment prohibited Officer Roth’s use of deadly force, Petitioners’ argument fails because it ignores undisputed facts found by the lower courts and misrepresents others. This is not a case where deadly force was used against a suspect for openly carrying a firearm. This is a case where a wanted felon armed with a handgun fled from law enforcement officers on foot through a residential neighborhood for over 12-minutes, ignored repeated lawful demands to drop his weapon, was undeterred by the use of non-lethal rounds, and then suddenly changed his course to move towards a group of innocent bystanders who were within firing range of his handgun. The decision below correctly found that Officer Roth is entitled to qualified immunity based on longstanding precedent that deadly force is not unreasonable when an officer reasonably believes a

suspect poses an imminent threat of serious harm to the officer or others. *See, e.g., Kisela v. Hughes*, 584 U.S. 100, 103 (2018); *Lankford v. City of Plumerville*, 42 F.4th 918, 921 (8th Cir. 2022).

II. The decision below applied the appropriate summary judgment standards in reaching factual findings of what the video footage does and does not depict.

All of Petitioners' arguments and questions presented are predicated on their assertion that a U.S. District Court judge and three Eighth Circuit judges improperly applied longstanding and core summary judgment principles. Petitioners' arguments rely on their assertion that Klum was not moving towards bystanders when he was shot and that the bystanders had all taken cover by that time.

Klum's flight from officers through a residential neighborhood while armed was captured on video from multiple different angles. The decision below correctly found, applying the correct summary judgment standards, that no reasonable person can dispute that Klum changed course and started walking in the general direction of bystanders, who were within lethal firing range of Klum's weapon, when Officer Roth shot him.

The decision below relied upon and applied this Court's longstanding holding in *Scott v. Harris*, 550 U.S. 372 (2007) in declining to find a disputed fact based on Petitioners' unsupported characterizations of Klum's and bystanders' movements that are directly contradicted by the video footage. Pet. App. 6a. "When opposing parties tell two different stories, one of which

is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of a ruling on a motion for summary judgment.” *Scott*, 550 U.S. at 247–48 (holding that when undisputedly reliable video footage captures the relevant events, the evidence should be viewed in “the light depicted by the videotape”).

Petitioners’ version of events is blatantly contradicted by the video footage. No error was committed below. Petitioners’ disagreement with what the video footage depicts is no reason to grant certiorari.

III. The decision below does not conflict with any precedent of this Court.

Petitioners claim that the decision below conflicts with *Tennessee v. Garner*, 471 U.S. 1 (1985) in two respects. First, Petitioners claim that the decision below violates *Garner*’s holding that simple possession of a gun is not grounds for the use of deadly force by an officer without the gun being used in a threatening manner. Second, Petitioners claim that the decision below violates *Garner*’s holding that a warning must be given, if feasible, before the use of deadly force. Pet. 14.

Petitioners’ argument that the decision below conflicts with *Garner* is based on their unreasonable disagreement with what the video footage shows. Klum was not shot simply because he possessed a handgun. *Garner* holds that “[a] police officer may not seize an unarmed, nondangerous suspect by shooting him dead.” 471 U.S. at 11. But that is not what

happened here, and the decision below is not in conflict with this rule.

Garner also holds “[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.” *Id.* The decision below adhered to *Garner* by finding the undisputed video evidence demonstrates Officer Roth reasonably believed Klum posed a threat of serious physical harm to bystanders.

At the time Officer Roth fired his weapon at Klum, he knew Klum had been evading arrest on foot in a residential neighborhood for more than ten minutes. Pet. App. 34a. Officer Roth was aware of Officer Mooty’s report that Klum was carrying a gun and saw Klum carrying a gun when he encountered him. Pet. App. 34a. Officer Roth knew Klum was committing crimes by fleeing from arrest. Pet. App. 22a. He knew Klum had ignored repeated commands to put down his gun and to stop. Pet. App. 34a. He knew rubber bullets had been fired at and hit Klum but had no meaningful effect. Pet. App. 35a. He also knew that despite a significant police response, multiple commands, and the use of less lethal force, Klum continued to flee and changed his course to walk towards a group of nearby bystanders outside of a home. Pet. App. 35a. These factual findings in the decision below demonstrate that this is not a case where Klum was shot merely because he had a weapon, but rather Officer Roth’s decision to use lethal force was based on a totality of circumstances confronting him.

Further, Officer Roth was not required to give an explicit warning to Klum that he was going to fire a lethal shot before doing so. At the outset, Petitioners ignore the fact that Klum had been given repeated warnings to stop and drop his weapon, and that he had been shot with a less lethal round. Despite all these opportunities, Klum refused to heed the multitude of warnings he had already been given.

The decision below correctly applied longstanding precedent holding that officers are not required to give an explicit warning that lethal force will be used under the circumstances of this case. The decision below correctly found the officers' repeated warnings to Klum during their prolonged pursuit with guns drawn and pointed at him combined with the ineffective use of non-lethal force to subdue Klum, provided Klum adequate warning that any perceived escalation in the dangerousness of the unfolding situation for the nearby officers or bystanders could result in the use of deadly force. Pet. App. 12a. Klum chose to escalate the situation by ignoring all non-lethal efforts to stop him and deciding to change his direction to walk towards innocent bystanders. No further warning to Klum was required. *See Loch v. City of Litchfield*, 689 F.3d 961, 976 (8th Cir. 2012) (when an officer draws his firearm, points it at an individual, and orders the individual to get on the ground, the officer's conduct "should have put [the suspect] on notice that his 'escalation of the situation would result in the use of the firearm.'" (citation omitted)); *see also Rogers v. King*, 885 F.3d 1118, 1122 (8th Cir. 2018).

IV. The decision below does not conflict with any decisions in the Circuit Courts.

Petitioners argue that the decision below conflicts with a litany of Circuit Court decisions. But, as Petitioners expressly recognize, those allegedly conflicting decisions hold that mere possession of a firearm does not, by itself, justify deadly force. Pet. 19. As explained above, those are not the facts of this case, and the decision below did not misapply summary judgment standards in determining the facts of this case. When accepting the facts of this case—and not the alternate reality proposed by Petitioners—the decision below does not conflict with any decisions in the Circuit Courts.

After reviewing and considering the undisputed and particularized facts of this case, the Eighth Circuit found “that any right was not clearly established at the time and therefore Officer Roth is entitled to qualified immunity.” Pet. App. 7a. Petitioners repeatedly argue that the decision below conflicts with *Cole ex rel. Est. of Richards v. Hutchins*’s holding that “it was clearly established that a person does not pose an immediate threat of serious physical harm to another when, although the person is in possession of a gun, he does not point it at another or wield it in an otherwise menacing fashion.” 959 F.3d 1127, 1134 (8th Cir. 2020). But Petitioners overlook the Eighth Circuit quoted *Cole*’s holding and expressly distinguished it, noting that “Klum’s possession of a firearm was not the only fact and circumstances confronting the officers that day.” Pet. App. 9a. The decision below then went on to explain how this is not a case where a suspect was shot merely for possessing

a gun. “[T]here were several bystanders outside near a house approximately half a block from where Klum was shot and in the general direction Klum was heading after the officers fired the rubber bullets at him.” Pet. App. 9a. Officer Roth was confronted with “an evolving set of circumstances” when he saw that Klum was unaffected by the rubber bullets and then changed course and began walking towards bystanders with his gun to his head, having already refused to comply with numerous commands to stop. Pet. App. 9a.

The decision below carefully considered and rejected Petitioners’ factual mischaracterizations and attempt to inaccurately frame the legal rights at issue in this case. The Eighth Circuit explained that its decision does not stand “for the position that lethal force is reasonable any time a suicidal individual with a weapon is within 300 feet of a bystander” or “for the position that lethal force is reasonable based on speculation *alone* about what someone with a gun might do in the future.” Pet. App. 12a (emphasis in original). The decision below correctly analyzed the totality of the circumstances confronting Officer Roth, including Klum’s decision to evade arrest and lead officers on a pursuit lasting twelve minutes through a residential neighborhood, Klum’s decision to ignore repeated commands to stop, Klum’s decision to continue to evade arrest even after nonlethal force was used against him, and Klum’s decision to then immediately change his direction and walk towards a group of innocent bystanders.

When the particular facts in this case are viewed in their entirety—and not selectively chosen or

ignored for Petitioners' benefit—there is no conflict between the decision below and the Circuit Court opinions cited by Petitioners. The decision below found that Officer Roth is entitled to qualified immunity because he did not violate any clearly established right at the time. “A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right.” *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (quotation omitted). “We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.” *Id.* at 12 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). None of the cases cited by Petitioners conflict with the decision below or put every reasonable officer on notice that Officer Roth's use of force violated a clearly established right. The cases cited by Petitioners merely stand for the non-controversial rule that an officer cannot use deadly force against a suspect merely because the suspect has a weapon. The decision below recognized and agreed with this non-controversial rule but correctly determined it does not apply to the undisputed facts of this case. The decision below does not conflict with any Circuit Court decisions, nor does it depart from established law.

V. Petitioners present only their disagreement with the factual findings in the decision below and not a legal question for this Court to review.

Petitioners' true issue with the decision below is that it did not accept their altered version of reality over the clear video evidence. Any purported conflict

with precedent of this Court and decisions in the Circuit Courts is illusory and based on Petitioners' false version of reality. When the facts are viewed as found by the lower courts applying appropriate summary judgment standards, there is no conflict between the decision below and any existing precedent. Petitioners present nothing more than their disagreements with the factual findings made by the courts below, not with any legal question decided by the courts below for this Court's consideration.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX

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**APPENDIX A — EXCERPTS FROM ANTHONY
JOHNSON DEPOSITION OF THE DISTRICT
COURT OF IOWA FOR SCOTT COUNTY,
DATED JANUARY 29, 2023**

IN THE DISTRICT COURT OF
IOWA FOR SCOTT COUNTY

CASE NO. LACV135302

NICOLE KLUM, INDIVIDUALLY
AND AS ADMINISTRATOR OF THE
ESTATE OF BOBBY JO KLUM,

Plaintiff,

vs.

CITY OF DAVENPORT AND MASON ROTH,

Defendants.

DEPOSITION OF ANTHONY JOHNSON

BE IT REMEMBERED, on the 30th day of
November, 2023, at 10:25 o'clock a.m., at the offices of Lane
& Waterman, 220 North Main Street, Dubuque, Dubuque
County, Iowa, the deposition of ANTHONY JOHNSON
was taken before Rachel Waterhouse-Schwalm, a Certified
Shorthand Reporter in and for the State of Iowa, in the
above-entitled matter.

[TABLES INTENTIONALLY OMITTED]

Appendix A

[3]ANTHONY JOHNSON, called as a witness having first been duly sworn, testified as follows:

QUESTIONS BY ATTORNEY O'BRIEN:

Q. Would you state your name for the record.

A. Anthony Johnson.

Q. And what do you do for a living?

A. I am a deputy with the Scott County Sheriff's Office, detective for sex offenders.

Q. And, Detective Johnson, my name is Dave O'Brien. We met briefly off the record.

A. Yes, sir.

Q. You understand that I am here representing the family of Bobby Klum based upon his shooting death by a Davenport police officer on October 13, 2021?

A. Yes, sir.

Q. And I have asked you to be here today to answer some questions because if I understand correctly you were present during that incident; is that right?

A. Yes.

Q. And have you ever had your deposition taken before?

3a

Appendix A

A. Yes, sir.

Q. All right. And so you are familiar with the rules. Let's try not to talk at the same time, and then also if I ask a confusing question, please have me clarify [4]before you give me an answer. Fair enough?

A. Yes, sir.

Q. All right. How long have you been with the Scott County Sheriff's Department?

A. At that time or now?

Q. Now.

A. Just -- I want to say just at four years.

Q. And have -- other than this incident on October 13, 2021, have you been involved in any other incidents involving the shooting death of a suspect by a law enforcement officer?

A. Only in an investigatory capacity.

Q. All right. And can you identify, was that one or more occasions?

A. Two.

(Attorney Faraj is now present.)

Appendix A

Q. (By Attorney O'Brien) And can you tell us just roughly about each of those?

A. We were the investigating agency for two different Davenport PD shootings. One involved the suspect being deceased, and the other involved the suspect being injured but recovered.

Q. Okay. And for the deceased one, can you tell me approximately when that happened?

A. Whew, man. I want to say that was early last

* * *

[17]Q. He wasn't just holding the gun to his head, he turned --

A. Right.

Q. -- and that movement would have given you a basis in your mind, a justification for using deadly force?

A. Yes, sir.

Q. And you were 10 yards from him did you say?

A. Roughly.

Q. Okay. Was -- what did the fact that he didn't orient the gun toward you, didn't try to put a shot off for you, what did that tell you about what his intent was?

Appendix A

ATTORNEY O'ROURKE: Objection, calls for speculation as to what Klum's intent was, but you can answer even if I object.

A. Okay.

ATTORNEY O'ROURKE: It is just for the record.

A. I mean, I thought that over like when we were in this, I shouldn't say war gamed, but when we reviewed this and talked about it within our department. Later that was one of the things I brought up to Sergeant Leonard, man, I probably should have shot him like because he did orient on me and he did have that gun. And he was like yeah, you would have been -- you would have been fine to. I mean, all the -- all the necessity was there, but he is like, you know, he is like I can't fault you for not doing [18]it. You are in that moment, you know. Every person is different.

Q. (By Attorney O'Brien) I understand. I understand that and I appreciate that. I appreciate your clarification. My question is that what -- the fact that you didn't fire for whatever reason you chose not to --

A. Sure.

Q. -- what -- and the -- he turned away from you and walked away, what did that tell you? What did that tell you? I am not asking you to speculate, I am asking --

A. Uh-huh.

Appendix A

Q. -- what it told you about his intent?

A. He didn't want a confrontation with me.

Q. All right. And isn't it true that throughout this sequence of events that happened over a twelve-minute period Bobby had several close encounters with other officers too, closer encounters; isn't that true?

A. I don't know about closer. I know he had several encounters with other officers, both prior to me getting there and after.

Q. And none of those encounters ended with Bobby moving the gun away from his head and trying to take a shot at one of the officer; right?

A. I don't believe so, no, sir.

Q. Did you ever see Bobby make, and I know you [19] talked about this one where you were -- setting that one aside --

A. Sure.

Q. -- did you ever see Bobby Klum on that day make other aggressive moves toward any other officer or bystander?

A. Yes.

Q. All right. What did you see?

7a

Appendix A

A. It was probably the thing that bothers me the most about this. When he was on Iowa he was in line with his house. I remember thinking this is going to end in just a surround and call out, we gas him out. That was my thought process at this point.

Q. I am sorry, I didn't catch that.

A. Oh, I apologize.

Q. This is what?

A. So as I see him walking down Iowa, he is past I think it is 8 1/2 or 8th Street where the squad was positioned. He was walking. He is in line, on the same street in line with his house. My mind is at this point I am already thinking okay, we are going to end in a surround and call out, and at most we are gassing him out of his house. Probably it would have been Davenport, not we. But that was where my mind was.

And then I remember this crowd of, I am trying [20] to be kind here, uncooperative subjects that were kind of diagonal south across the street from him, refused to go inside. When he runs towards them he has got a gun in his hand and he is running towards a crowd. Most of the crowd actually started running up towards their house when he started crossing the street, but I remember an old lady and a small kid who were trailing behind them. That was the other aggressive thing that I personally witnessed.

Appendix A

Q. Okay. So the -- where were you located as Bobby crossed 9th Street heading in a southern direction on the west side of Iowa?

A. Oh, so you are talking like back up towards by the alley?

Q. Well, you just described you saw him, he was going toward his own house?

A. Yes, sir.

Q. And so he was crossing 9th Street heading towards 8th Street; right?

A. Right.

Q. Where were you located at the time he crossed 9th Street?

A. Is that where the squad was positioned?

Q. There was a -- I will show you.

A. I am sorry, I am just trying to be honest.

ATTORNEY O'ROURKE: I think we will all [21] stipulate to that.

Q. (By Attorney O'Brien) Yeah. That is where the squad was, was located at the corner --

Appendix A

A. That was 9th. I apologize.

Q. At the corner of 9th and Iowa. Okay.

A. Oh, from there, yes, when he is crossing -- when he is crossing 9th I believe I had just gotten through the alley, and I am still on Iowa from that alley running towards the squad at that point when he is crossed -- or crossed or crossing.

Q. And you -- you see him crossing Iowa and you actually know his address; right?

A. Yes, sir.

Q. And you are thinking he is going to go home and we are going to have this standoff in his house?

A. Yes, sir.

Q. Did you convey that information over dispatch to other officers at the time that he lived at that residence?

A. I did not.

Q. Okay. So you would have known that but you wouldn't expect any other officers to know that?

A. No.

Q. Let's avoid the double negative. You agree with me that no other officers would have known that?

Appendix A

[22]ATTORNEY O'ROURKE: Objection, calls for speculation as to what the officers knew about Klum's address.

Q. (By Attorney O'Brien) Well, let me clarify the question. You didn't convey the information you had to any other officers?

A. Yes, sir, not at that time.

Q. Until after the incident?

A. Yes, sir.

Q. You didn't see him use his cell phone?

A. Uh-uh, no, sir.

Q. And were you present at the corner, around the corner of 9th and Iowa at the time the 40 millimeter rounds were fired?

A. Yes.

Q. And you still had your rifle in your hand at that time?

A. Yes, sir.

Q. Was your rifle aimed center mass at Bobby Klum?

A. I was -- at that time I was tracking him in my holographic sight, yes.

Appendix A

Q. And did you continue to track him up to the point where he was shot by Officer Roth?

A. Yes, sir, I did.

Q. All right. And so you had him center mass in [23] your sights that whole time?

A. Yes. I actually thought I shot him. I didn't put that my report, but I actually thought I shot him.

Q. All right. You knew you didn't pull the trigger though, didn't you?

A. Well, I felt around. I am like no, my safety is still on, but just because you are tracking somebody so intently as they are going across the street preparing and then you hear that and you are like whoa, was that me?

Q. All right. So you thought you might have shot him. Did you try to pull the trigger and realize your safety was on?

A. No.

Q. So if you had shot him, would have been something you did unconsciously?

A. I don't want to say that. That is a conscious effort. I was just saying I am focussed on him, in my mind I am preparing to do that because he is getting too close to the other side of the street, and then I hear the shot, that broke my concentration.

Appendix A

Q. All right. So I just want to make sure I am clear. You never intentionally pulled the trigger?

A. No, not at all.

Q. Do you recall Bobby Klum changing directions to go from the west to the east side of Iowa Street once one [24]of the 40 millimeter rounds hit him?

A. Yes, sir.

Q. All right.

A. Yes.

(Exhibit 62 was marked for identification.)

Q. (By Attorney O'Brien) I have handed you a Google overhead of the block between 9th Street and 8th Street with Iowa being in the center of the, Iowa Street being in the center of the overhead. Do you see that?

A. I see it. This is -- oh, you are saying this is Iowa right here? (Witness indicated.)

Q. Correct. Iowa is in the center top to bottom, running top to bottom of the overhead, and then 9th Street is at the top as you have the document oriented and 8th Street is at the bottom.

A. Uh-huh.

Appendix A

Q. Do you see that?

A. Yes, sir.

Q. Do you recognize that area now that we have put it into context?

A. Yes, sir.

Q. All right. And I take it you could look on that. Can you look in that document and just point to me where Bobby Klum's house was as you remember?

A. (Witness indicated.)

[25]Q. Right here. All right. So let's have you take this red pen and just put BC on the house that you recognized as his home?

A. (Witness indicated.)

Q. And then why don't you go ahead, if you recall, can you put a mark where you were located at the time, roughly where you were located, and it may not be on this document, if it is let me know, roughly where you were located at the time Officer Roth fired the lethal round at Bobby Klum?

A. (Witness indicated.)

Q. Can you put your initials by that red X?

Appendix A

A. (Witness indicated.)

ATTORNEY O'ROURKE: Can we go off the record for a second?

(Discussion was had off the record.)

Q. (By Attorney O'Brien) So if he put it this way we have got north at the top; is that right?

A. Yes.

Q. All right. But that doesn't change your locations of where, you are still identified now, you are at the top of the page; is that right?

A. Uh-huh, yes, sir.

Q. And you have still got the house marked where you knew Bobby to reside --

[26]A. Yes, sir.

Q. -- in the correct place; correct?

A. Yes, sir.

Q. All right. Why don't you go ahead and put an X at the location oriented anyway that helps you where you believe Bobby Klum was at the time he was shot and killed, his locations?

Appendix A

A. When he was shot and killed?

Q. Yes.

A. I want to say it was like right in here. (Witness indicated.)

Q. So you put an X. Can you put a BK there?

A. Did you tell me to put a BC or a BK up here?

Q. Oh, I told you to put a BC but it is actually BK, isn't it? Why don't you change that.

A. I just wanted to make sure. (Witness indicated.)

Q. I appreciate it. That was my fault. You marked an X, and you are pretty much saying he is under that tree that is visible on the -- on the overhead; right?

A. Yes, sir.

Q. All right. And can you circle on that, on that document the area where you believed these bystanders we located at the time Officer Roth fired the lethal shot? Where were the bystanders located?

[27]A. At the time?

Q. Yes.

Appendix A

A. I thought these two were trailing right here, and then there was a larger group right here. (Witness indicated.)

Q. Okay. And the circled, we will just leave them blank. The only circled on the page are where you believe two groups of bystanders were located at the time Bobby was shot?

A. Uh-huh.

Q. Is that right?

A. Yes, sir.

Q. Okay. Thank you. And I take it the ones closest to the alley at East 8 1/2 Street were the ones that you were most concerned about because Bobby was quite a bit closer to them than the others; is that fair to say?

A. Yes, sir.

Q. All right. How close do you think he got to those people before Officer Roth fired?

A. Honestly I couldn't tell you because I was pretty oriented on him.

Q. Not sure, but you do have these people identified where you believe they were --

A. Uh-huh.

Appendix A

Q. -- at the time Bobby was killed?

[28]A. Yes, sir.

ATTORNEY O'BRIEN: And that is Deposition Exhibit 62. Let's take a break. Well, I have no further questions. Thank you.

QUESTIONS BY ATTORNEY O'ROURKE:

Q. Not that fast. I have just a few, Detective.

A. Yes, sir.

Q. My name is Jason O'Rourke. I represent Officer Roth and the City of Davenport. You made the comment that as Mr. Klum was crossing Iowa Street to the southeast you were preparing to shoot because he was getting close to the other side of the street?

A. Yes, sir.

Q. Can you explain for us what you meant by that and why it was you were concerned and getting prepared to shoot?

A. So part of that was he had already been hit twice with less lethal rounds and like watched, shrugged off, which was concerning. Didn't understand why he was going to that side of the street, but I did see the crowd that was refusing to move and that was when I started tracking him.

Appendix A

The way I use my rifle, been trained to is ride the safety, and my trigger finger is indexed along the lower frame. When I swipe the safety down, and like that [29] is all one motion for me, safety going down, finger goes the trigger and I pull on the slide. As I am tracking him. I am putting pressure on my safety, but I did not depress it. As he is getting, I want to say right around here is when in my head, I am like we have got to do something. And then I heard the shot, and that was why I said like did I do that kind of thing. I am like nope, safety is still in place. (Witness indicated.)

Q. So when you say in your head we got to do something, why is it you think you need to do something?

A. Because he is placing the public in danger at this point. Man with a gun running into a crowd of people can't do that.

Q. Why did the fact that he shrugged off the 40 mill rounds have -- cause concern for you?

A. We don't have a whole lot of other options. I mean, generally the impact from a 40 millimeter is going be enough to make most people fold, to stop. Like it hurt a lot. The fact that he shrugged off two and then decided to go across the street was like, he is -- in my mind he is escalating.

Q. You were asked a question earlier if you believed you would have been justified shooting Mr. Klum during

Appendix A

the first encounter. Let me ask this: At the time he was crossing Iowa Street, do you believe you would have [30] been justified in using lethal force or deadly force?

A. Yes, sir.

Q. Why?

A. Because he is clearly going, two things, he is -- his house is right there, and then he is making the decision to go towards this crowd of people. There just -- doesn't make any sense to me. Like you are going to be a threat or use them as cover. I don't know what his intent was other than he is making himself a threat to those people by running toward them with a gun.

Q. And do you recall that after the 40 millimeter rounds were shot officers continued to instruct him to drop the weapon and stop?

A. Yes.

Q. Did he comply?

A. No.

ATTORNEY O'ROURKE: Detective, that is all I have. Thank you.

A. Yes, sir.

Appendix A

QUESTIONS BY ATTORNEY O'BRIEN:

Q. I have a couple. Just follow-up quickly. One of the factors you would have used in determining deadly force or not was your knowledge of where Bobby Klum lived and that he had chosen to walk away from his house? That is one of the factors you would have considered?

[31]A. It is. I -- I am conflating that a little bit because again I didn't realize that this was him until I seen him on the ground --

Q. All right.

A. -- so I do apologize for that.

Q. That is fine. And the second, the other factor was the location where these bystanders were and his approach of them as you set out on your diagram Deposition Exhibit 62; correct?

A. Yes, sir.

Q. And he was getting close enough to them where you felt it would have been justified to use deadly force under those circumstances?

A. Absolutely.

ATTORNEY O'BRIEN: All right. Thank you --

ATTORNEY FARAJ: Whoa.

Appendix A

Q. (By Attorney O'Brien) Yeah. Counsel suggested a good question. Because there were some radio calls that went out identifying him as Bobby Klum. Do you recall those?

A. I know -- I mean, I know from the fact that I have reviewed the call notes when I was writing my report that he was identified fairly early on I want to say. I did not hear that. I only remember hearing that he was wanted and a man with a gun. I don't know why. I just --

[32]Q. Fair enough. So you are back to your -- we are back to your original statement, which was after you -- you didn't realize it was the Bobby Klum that you knew until after he was shot and killed?

A. Correct.

ATTORNEY O'BRIEN: No further questions.

ATTORNEY O'ROURKE: All right. You are free to go.

(The deposition concluded at 10:58 a.m.)

[CERTIFICATE OF SHORTHAND REPORTER
INTENTIONALLY OMITTED]

**APPENDIX B — EXCERPTS FROM PLAINTIFF
NICOLE KLUM'S RESPONSES TO DEFENDANTS'
REQUESTS FOR ADMISSIONS**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
EASTERN DIVISION

Case No. 3:23-cv-00043-RGE-WPK

NICOLE KLUM, INDIVIDUALLY AND AS
ADMINISTRATOR OF THE ESTATE OF BOBBY JO
KLUM, AND WANDA ALBRIGHT, INDIVIDUALLY,

Plaintiffs,

vs.

CITY OF DAVENPORT AND MASON ROTH,

Defendants.

**PLAINTIFF NICOLE KLUM'S RESPONSES TO
DEFENDANTS' REQUESTS FOR ADMISSIONS**

COMES NOW, Plaintiff, Nicole Klum, through
the undersigned, and for her responses to Defendants'
Request for Admissions, responds as set out below:

* * *

*Appendix B***REQUESTS FOR ADMISSIONS**

REQUEST FOR ADMISSION No. 1: Admit that in 2011 Bobby Jo Klum was convicted of sex offender registration violation second or subsequent offense in the Iowa District Court in and for Scott County, Case No. FECR333789.

ANSWER: Admit. Note this evidence is irrelevant, unfairly prejudicial, and inadmissible in the trial of this case. Only facts known to law enforcement officers at the time may be used to justify the use of deadly force by those officers. “To establish a constitutional violation under the Fourth Amendment’s right to be free from excessive force, the test is whether the amount of force used was objectively reasonable under the particular circumstances.” *Henderson v. Munn*, 439 F.3d 497, 502 (8th Cir. 2006). “It is well settled that this reasonableness standard is viewed from the vantage point of the police officer at the time of arrest or seizure.” *Gill v. Maciejewski*, 546 F.3d 557, 562 (8th Cir. 2008). “The issue of reasonableness must be examined from the perspective of the facts known to the officer at the time of the incident.” *Schulz v. Long*, 44 F.3d 643, 648 (8th Cir.1995).

REQUEST FOR ADMISSION No. 2: Admit that Bobby Jo Klum was incarcerated as a result of his conviction in Scott County Case No. FECR333789.

ANSWER: Admit. Note this evidence is irrelevant, unfairly prejudicial, and inadmissible in the trial of this case. See Response to Request to Admit No. 1, above.

Appendix B

REQUEST FOR ADMISSION No. 3: Admit that in 2014 Bobby Jo Klum was convicted of burglary third in the Iowa District Court in and for Scott County, Case No. FECR356902.

ANSWER: Admit. Note this evidence is irrelevant, unfairly prejudicial, and inadmissible in the trial of this case. See Response to Request to Admit No. 1, above.

REQUEST FOR ADMISSION No. 4: Admit that in 2014 Bobby Jo Klum was convicted of theft second in the Iowa District Court in and for Scott County, Case No. FECR356902.

ANSWER: Admit. Note this evidence is irrelevant, unfairly prejudicial, and inadmissible in the trial of this case. See Response to Request to Admit No. 1, above.

REQUEST FOR ADMISSION No. 5: Admit that in 2014 Bobby Jo Klum was convicted of conspiracy to commit felony in the Iowa District Court in and for Scott County, Case No. FECR356902.

ANSWER: Admit. Note this evidence is irrelevant, unfairly prejudicial, and inadmissible in the trial of this case. See Response to Request to Admit No. 1, above.

REQUEST FOR ADMISSION No. 6: Admit that Bobby Jo Klum was incarcerated as a result of his convictions in Scott County Case No. FECR356902.

ANSWER: Admit. Note this evidence is irrelevant, unfairly prejudicial, and inadmissible in the trial of this case. See Response to Request to Admit No. 1, above.

Appendix B

REQUEST FOR ADMISSION No. 7: Admit that in 2017 Bobby Jo Klum was convicted of sex offender registration violation second or subsequent offense in the Iowa District Court in and for Scott County, Case No. FECR377408.

ANSWER: Admit. Note this evidence is irrelevant, unfairly prejudicial, and inadmissible in the trial of this case. See Response to Request to Admit No. 1, above.

REQUEST FOR ADMISSION No. 8: Admit that Bobby Jo Klum was incarcerated as a result of his conviction in Scott County Case No. FECR377408.

ANSWER: Admit. Note this evidence is irrelevant, unfairly prejudicial, and inadmissible in the trial of this case. See Response to Request to Admit No. 1, above.

REQUEST FOR ADMISSION No. 9: Admit that in August 2021, Klum was charged with three more felony counts of violations of the Iowa Sexual Offender Registry in the Iowa District Court in and for Scott County, Case No. FECR417597.

ANSWER: Admit. Note this evidence is irrelevant, unfairly prejudicial, and inadmissible in the trial of this case. See Response to Request to Admit No. 1, above.

REQUEST FOR ADMISSION No. 10: Admit that on August 19, 2021, an Arrest Warrant was issued for the arrest of Bobby Jo Klum in Scott County Case No. FECR417597.

Appendix B

ANSWER: Admit. Note this evidence is irrelevant, unfairly prejudicial, and inadmissible in the trial of this case. See Response to Request to Admit No. 1, above.

REQUEST FOR ADMISSION No. 11: Admit that on August 20, 2021, the Arrest Warrant issued in Scott County Case No. FECR417597 was served and Bobby Jo Klum was arrested.

ANSWER: Admit. Note this evidence is irrelevant, unfairly prejudicial, and inadmissible in the trial of this case. See Response to Request to Admit No. 1, above.

REQUEST FOR ADMISSION No. 12: Admit that on August 20, 2021, Bobby Jo Klum was interviewed by a detective with the Davenport Police Department.

ANSWER: Admit. Note this evidence is irrelevant, unfairly prejudicial, and inadmissible in the trial of this case. See Response to Request to Admit No. 1, above.

REQUEST FOR ADMISSION No. 13: Admit that on August 20, 2021, Nicole Klum had a minor daughter with the initials A.N.

ANSWER: Admit. Note this evidence is irrelevant, unfairly prejudicial, and inadmissible in the trial of this case. See Response to Request to Admit No. 1, above.

**APPENDIX C — EXCERPTS FROM PLAINTIFF
WANDA ALBRIGHT'S RESPONSES TO
DEFENDANTS' REQUESTS FOR ADMISSIONS**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
EASTERN DIVISION

Case No. 3:23-cv-00043-RGE-WPK

NICOLE KLUM, INDIVIDUALLY AND AS
ADMINISTRATOR OF THE ESTATE OF BOBBY JO
KLUM, AND WANDA ALBRIGHT, INDIVIDUALLY,

Plaintiffs,

VS.

CITY OF DAVENPORT AND MASON ROTH,

Defendants.

**PLAINTIFF WANDA ALBRIGHT'S RESPONSES
TO DEFENDANTS' REQUESTS FOR ADMISSIONS**

COMES NOW, Plaintiff, Wanda Albright, through
the undersigned, and for her responses to Defendants'
Request for Admissions, states the following:

* * *

*Appendix C***REQUESTS FOR ADMISSIONS**

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