No. 20-1471

# In the Supreme Court of the United States

JONATHAN LOZADA, PETITIONER

*v.*

DUDLEY TEEL

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

## BRIEF IN OPPOSITION


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## QUESTION PRESENTED

Whether every reasonable police officer would have known that restraining Susan Teel by shooting her three times without warning was not "objectively reasonable in light of the facts and circumstances confronting [the officer]." *Graham v. Connor*, 490 U.S. 386, 397 (1989).

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**BRIEF FOR DUDLEY TEEL IN OPPOSITION**

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The opinion of the court of appeals (Pet. App. 1-20) is unreported but can be found at 826 F. App'x 880. The district court's order on defendants' motions for summary judgment (Pet. App. 21-37) is unpublished.

## JURISDICTION

The judgment of the court of appeals was entered on September 23, 2020. Pet. App. 1. The Eleventh Circuit denied rehearing en banc on November 18, 2020. Pet. App. 40. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATEMENT

1. The Fourth Amendment guarantees a person's right to be free from the excessive use of force—especially, deadly force. *See Graham v. Connor*, 490 U.S. 386, 394-95 (1989). This right is not absolute. *Id.* at 396. A police officer may use some degree of physical coercion to effectuate an arrest or seizure. *See Terry v. Ohio*, 392 U.S. 1, 22-27 (1968). But to be constitutional, such use of force must be objectively reasonable. *Id.* at 20-22.

More than three decades ago, this Court tailored a balancing test to determine whether a particular use of force by a police officer is justified. *See Graham*, 490 U.S. at 396. Courts are instructed to apply what have come to be known as the three "*Graham* factors," which weigh (1) "the severity of the crime at issue"; (2) "whether the suspect poses an immediate threat to the safety of the officers or others"; or (3) "whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* The *Graham* inquiry is not rigid. *Id.* Its "application requires careful attention to the facts and circumstances of each particular case." *Id.* And the ultimate question is always

"whether the totality of the circumstances justifie[s] a particular sort of . . . seizure." *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985).

2. On July 26, 2017, the Indian River County Sheriff's Office dispatch notified officers of a suicide in progress. Pet. App. 3, 22. The victim, the decedent Susan Teel, "had 'possibly cut herself,' was 'under the influence of alcohol,' and had a knife." *Id.* at 3. Mrs. Teel "had slit both of her wrists, 'was bleeding out,' and needed to go to the hospital." *Id.*

Officer Jonathan Lozada was the first officer to arrive on the scene. *Id.* He spoke briefly to Mrs. Teel's husband, respondent Dr. Dudley Teel. *Id.* at 3-4. Dr. Teel told Officer Lozada that Mrs. Teel was upstairs, was trying to kill herself, was under the influence of narcotics or alcohol or both, and that she had a knife. *Id.* at 4. Officer Lozada thought he saw blood on Dr. Teel's shirt. *Id.* Officer Lozada understood that Mrs. Teel had not tried to harm Dr. Teel and had no reason to believe that she was a danger to anyone other than herself. *Id.*

Though Officer Lozada was armed with pepper spray and a taser, *id.* at 7, he immediately drew his gun to his chest and advanced up the stairs. *Id.* at 4. At the top of the stairs he observed Mrs. Teel, 60 years old, 5'2" tall, and 120 pounds, lying quietly on a canopy bed in the master bedroom, wearing a bathrobe. *Id.* at 4-5.

Officer Lozada paused briefly, then walked to the doorway of the bedroom. *Id.* at 4. Mrs. Teel was lying on the bed with her hands behind her back. *Id.* Officer Lozada stated in an assertive tone: "Susan, Sheriff's Office. Let me see your hands." Pet. App. 5. Mrs. Teel showed the officer her hands, "revealing a kitchen knife with an eight-inch blade in her left hand." *Id.* She stood up from the bed and "held the knife with the blade pointed down over her head." *Id.* She stood on the far side of the

bed at this point, with the bed between her and Officer Lozada. *Id.* at 6. Officer Lozada took two or three steps inside the bedroom. *Id.* at 5-6. For the next 8 to 10 seconds neither spoke or moved. *Id.* at 6.

Mrs. Teel began gradually walking around the bed and toward Officer Lozada. *Id.* She told Officer Lozada "Fuck you. Kill me." *Id.* Officer Lozada "pointed his gun at Mrs. Teel[,] .... took a step back and radioed emergency traffic reporting that Mrs. Teel had a knife." *Id.* "Come on, just do it," she said. *Id.* "[D]on't come," Officer Lozada said. *Id.*

Officer Lozada has since admitted that he could have fully retreated at that point, "leaving the bedroom and even walking down the stairs if Mrs. Teel continued to advance." *Id.* at 6, 13. He also admitted that he could have deescalated to either of the two non-lethal weapons he was carrying. *Id.* at 7, 13. He testified that because he had already shown Mrs. Teel his gun, he was "not going to deescalate to non-lethal." *Id.* at 7.

Instead, he shot Mrs. Teel. *Id.* Her body shuddered as the bullet struck, but, according to Officer Lozada, the only witness, she continued to advance toward him at the same gradual pace. *Id.* He stepped back and shot her again. *Id.* And then again. *Id.* He shot her three times, "once in the chest and twice in the abdomen." *Id.*

"Officer Lozada radioed for emergency medical services, telling dispatch that shots had been fired." *Id.* At this point another officer had arrived on the scene and was yelling Officer Lozada's name from the base of the stairs. *Id.* Mrs. Teel was lying in the doorway of the bedroom. *Id.* She died a few minutes later. *Id.*

3. Dr. Teel sued Officer Lozada and Sheriff Deryl Loar of the Indian River County Sheriff's Office, alleging violations of 42 U.S.C. § 1983 and Florida's Wrongful Death Act. *Id.* at 8. Following discovery, the district

court granted summary judgment to the defendants. *Id.* The district court held that no reasonable jury could conclude that Officer Lozada had used excessive force. *Id.* at 24-25, 29, 33. Recognizing that "there could be room for doubt" because "Defendant Lozada was the only living person to see these events occur and was not wearing a body camera," the court nonetheless concluded that Dr. Teel's failure to "dispute that Mrs. Teel continued to walk towards Defendant with a knife before each shot" was "a central admission" that made Officer Lozada's use of deadly force reasonable. *Id.* at 29. "Had Mrs. Teel stopped walking after any shot, or had she dropped the knife at any point, I might reach a different conclusion." *Id.* at 33. "[B]ut based on the agreed facts, a reasonable officer would be justified in using deadly force." *Id.* "Finding no constitutional violation, the district court did not determine whether Mrs. Teel's clearly established rights were violated." *Id.* at 8. Because all of the remaining claims similarly required a showing of excessive force, the district court granted summary judgment on plaintiff's remaining claims as well. *Id.*

4. On appeal, the Eleventh Circuit reversed. "Viewing the evidence in the light most favorable to Dr. Teel and drawing all reasonable inferences in his favor" the Eleventh Circuit "conclude[d] that Dr. Teel met his burden to show that Officer Lozada violated Mrs. Teel's constitutional right to be free from the excessive use of force." *Id.* at 10. The Eleventh Circuit further "conclude[d] that the law was clearly established at the time of the encounter that the force Officer Lozada employed was excessive." *Id.*

At petitioner's urging, Lozada C.A.Br.10-18, the Eleventh Circuit applied the "*Graham* factors," *id.* at 10, from *Graham v. Connor*, 490 U.S. 386, 394-95 (1989), that courts use to determine whether a police officer has used constitutionally excessive force. Pet. App. 10-11.

Following *Graham*, the Eleventh Circuit "examin[ed] the totality of the circumstances, including 'the severity of the crime at issue, whether the suspect pose[d] an immediate threat to the safety of the officer[ ] or others, and whether [she] [was] actively resisting arrest or attempting to evade arrest by flight.'" *Id.* at 11 (quoting *Graham*, 490 U.S. at 396); *see also* Lozada C.A.Br.11 (same).

The Eleventh Circuit held that the first *Graham* factor—"the severity of the crime at issue"—weighed against the reasonableness of Officer Lozada's use of force because in Florida attempted suicide is not a crime. Pet. App. 11-12.

The Eleventh Circuit next held that a reasonable jury could conclude that the second *Graham* factor—"whether the suspect pose[d] an immediate threat to the safety of the officer[ ] or others"—also weighed against the reasonableness of Officer Lozada's use of force. *Id.* at 12-14. The Eleventh Circuit held that "Mrs. Teel was armed with a knife and walking in [Officer Lozada's] direction" but that other disputed material facts in the record could lead a reasonable factfinder to conclude that Mrs. Teel did not pose a sufficiently grave threat to Officer Lozada or anyone other than herself to justify Officer Lozada's use of deadly force. *Id.* at 12-13. Officer Lozada "understood that Mrs. Teel had not threatened her husband or anyone else," Mrs. Teel "did not verbally threaten Officer Lozada and was not pointing the knife at him," "he shot her without any warning" when she "was 10 feet away," "[h]er walk was gradual, and she never picked up pace or made any sudden movement," "[s]he was diminutive in size," and he "was aware" that retreat or non-lethal force "were available means of resolving the situation." *Id.* at 13-14.

Finally, the Eleventh Circuit held that the third *Graham* factor—"whether [the suspect] [was] actively resisting arrest or attempting to evade arrest by flight"—

also weighed against the reasonableness of Officer Lozada's use of force. *Id.* at 14-15. "Mrs. Teel complied with Officer Lozada's order that she show her hands." *Id.* at 14. "She showed him a knife, but Officer Lozada never ordered her to drop it." *Id.* "He never ordered her to stop where she was or put her hands down, despite having 10 seconds to do so while she stood from the bed and paused." *Id.* at 14-15. He did not "issue any warning after she began walking in his direction." *Id.* at 15.

Having concluded that Officer Lozada used excessive force, the Eleventh Circuit further held that Officer Lozada's use of force violated clearly established law. *Id.* at 15-19. Applying the "'obvious clarity' rule," *id.* at 17, the Eleventh Circuit held that "every reasonable officer" would conclude on the basis of the record, viewed in the light most favorable to Dr. Teel, that the force used in this case was excessive. *Id.* at 17-18. A police officer may not seize by shooting dead, "without warning," a suicidal person, "not suspected of committing any crime," who poses no immediate threat to the officer or anyone else but herself and from whom the officer had the opportunity to "retreat." *Id.* at 18-19.

**ARGUMENT**

Petitioner contends that the court below (1) erred by using the *Graham* factors to analyze the reasonableness of a police officer's use of force in responding to a non-criminal emergency, Pet. 9-19, (2) erred by holding that Officer Lozada violated clearly established law, *id.* at 20-22, 30-32, and (3) erred in its consideration of the evidence in the summary judgment record, *id.* at 22-29.

Those assignments of error do not warrant certiorari in this case. The court of appeals correctly determined, on the basis of the concededly "unique facts of this case," Pet. i, that a reasonable jury could conclude that Officer Lozada used excessive force that violated clearly

established law. Petitioner's argument about the application of the *Graham* factors is waived and, in any event, to the extent it involves a conflict at all, presents at best a shallow and nascent conflict that does not warrant this Court's review. Moreover, this decision would have come out the same way if the Eleventh Circuit had applied the analysis petitioner prefers. Petitioner's other assignments of error are factbound and do not involve a conflict with any decision of this Court or any other court of appeals. This case's interlocutory posture and Officer Lozada's status as the only witness make it an especially poor vehicle for considering petitioner's challenges. Further review is not warranted.

**I. The Decision of the Court of Appeals is Correct**

The Eleventh Circuit correctly determined that Officer Lozada used constitutionally excessive force under clearly established law. The record supports the conclusion that Mrs. Teel was not threatening Officer Lozada at all but merely walking toward him slowly. Pet. App. 5-6, 23; C.A. App. Vol. III, at 99-100, 103-04 (Lozada Deposition). The record supports the conclusion that Mrs. Teel could have been disarmed or otherwise restrained by means of an order to drop the knife, a warning that she would be shot if she continued to advance, by pepper spray, or by taser. Pet. App. 13; C.A. App. Vol. III, at 57, 75, 95, 99, 107-09, 118-19 (Lozada Deposition). The record supports the conclusion that Officer Lozada could have safely eliminated any threat to himself or others by simply retreating from the room and down the stairs.[1] Pet. App. 13; C.A. App. Vol. III, at 109

[1] When asked "One of the things that you could have done was to walk back out of the room and go downstairs and take yourself out of harm's way; correct?" Officer Lozada answered "Sure." C.A. App. Vol. III, at 109. When asked: "Why didn't you holster your weapon and deescalate to a different type of potential protection for

(Lozada Deposition). The record also supports the conclusion that Mrs. Teel posed no genuine threat to Officer Lozada because she was a 60 year old 5'2" tall woman who was bleeding to death from self-inflicted knife wounds. Pet. App. 5 n.4, 19; C.A. App. Vol. III, at 57-58 (Lozada Deposition). Every reasonable officer would have realized that the use of a firearm to restrain Mrs. Teel in these circumstances constituted the use of excessive force.

## II. The Question Whether the *Graham* Factors Should Apply to Non-Criminal Emergencies Does Not Warrant This Court's Review

Petitioner's argument that the *Graham* factors should not be used to determine the reasonableness of the use of force in non-criminal emergencies does not warrant this Court's review.

1. As an initial matter, this argument is waived. Petitioner urged application of the *Graham* factors in his briefing below, including specifically consideration of "the severity of the crime at issue" and "whether the suspect actively resisted arrest or attempted to evade arrest by flight." Lozada C.A.Br.11. Nor did petitioner argue for modification of the *Graham* factors in his petition for rehearing *en banc*. Lozada C.A.Pet'n. This Court is "a court of review, not of first view." *Cutter v. Wilkinson*,

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yourself?" Officer Lozada answered because "she produced a knife. To me, that's lethal force," *id.* at 127-28, and once "lethal force has been introduced, … I'm going to, unfortunately I'm going to have to match it with lethal force," *id.* at 126. When asked: "So you didn't give her a warning." Officer Lozada answered "No, I did not." *Id.* at 103. When asked "You shouted to her drop the knife." Officer Lozada answered: "I didn't, I didn't say drop the knife." *Id.* at 102. Officer Lozada testified that he "didn't have time" to issue any commands or warnings "[b]ecause she was closing in the distance" but he admitted it took Mrs. Teel "[e]ight to ten seconds" to begin walking toward him once she stood up from the bed. *Id.* at 106-07.

544 U.S. 709, 718 n.7 (2005). Absent "exceptional" circumstances, *Duignan v. United States*, 274 U.S. 195, 200 (1927), this Court will not consider a question "without the benefit of thorough lower court opinions to guide [its] analysis of the merits," *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012). This Court's "traditional rule" is to deny certiorari "when the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted); *see Illinois v. Gates*, 462 U.S. 213, 218-20 (1983); *see also Hall Street Assocs. L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 591 (2008) (refusing to consider an issue even where a petitioner had "suggested something along these lines in the Court of Appeals").

2. Moreover, there is no genuine conflict among the circuits on how the *Graham* factors apply to non-criminal emergencies. In every Circuit the rule is the same: where the emergency is non-criminal, the need to arrest or apprehend the "suspect" is not a justification for the use of force. Instead, the justification must arise from an immediate threat posed by or to the individuals involved in the emergency.

A. The Sixth Circuit's test in *Estate of Hill v. Miracle*, 853 F.3d 306 (6th Cir. 2017) is basically the same test the Eleventh Circuit applies. *Miracle* calls on courts to determine (1) whether a "person experiencing a medical emergency … pose[s] an immediate threat of serious harm to himself or others"; (2) whether "some degree of force [is] reasonably necessary to ameliorate the immediate threat"; and (3) whether the force used was "excessive." *Id.* at 314. In other words, like the Eleventh Circuit, *Miracle* holds that the first *Graham* factor weighs against the use of force in non-criminal emergencies, and that such force must be justified based on other factors. *See id.* In the Sixth Circuit, just like the Eleventh, there is no reason to use force in a non-criminal

emergency unless the person experiencing the emergency poses some kind of threat to "himself or others." The decision below would have come out the same way under the *Miracle* test.

B. Petitioner admits that the tests used by other Circuits are similar to the Eleventh Circuit's. Petitioner explains that the Fourth Circuit also holds that "the severity of the crime factor cannot be taken into account because there was no crime." Pet.16 (citing *Estate of Armstrong ex rel. Armstrong v. Village of Pinehurst*, 810 F.3d 892 (4th Cir. 2016) and *Connor v. Thompson*, 647 F. Appx. 231 (4th Cir. 2016)). Petitioner quotes from *Harris v. Serpas*, 745 F.3d 767, 772 (5th Cir. 2014), which concludes that in a non-criminal emergency the *only* relevant consideration in assessing the government's interest in using deadly force is "whether the [officer] was in danger at the moment of the threat that resulted in the [officer's] shooting." Pet.16 (quoting *Serpas*, 745 F.3d at 772); *see also* Pet.17 (citing *Rockwell v. Brown*, 664 F.3d 985, 993 (5th Cir. 2011)). The First Circuit takes a similar approach. *See* Pet.19 (citing *Gray v. Cummings*, 917 F.3d 1 (1st Cir. 2019)). As the First Circuit explained in *Gray*, "the level of force that is constitutionally permissible" in dealing with a non-criminal emergency "'differs both in degree and in kind from the use of force that would be justified against a person who has committed a crime or who poses a threat to the community.'" 917 F.3d at 11 (quoting *Bryan v. MacPherson*, 630 F.3d 805, 829 (9th Cir. 2010)).

The Ninth Circuit's decision in *Ames v. King County, Washington*, 846 F.3d 340 (9th Cir. 2017) is in line with these decisions. On the unique facts of that case, the Ninth Circuit identified an additional potential interest that can be involved in non-criminal emergency situations. Namely, *Ames* held that force may be applied when a person is obstructing the ability of first responders to save

a life during a non-criminal emergency. *Id.* at 345-46. But that interest is not implicated in this case. Officer Lozada did not shoot Mrs. Teel because she was obstructing his ability to render lifesaving aid. And *Ames* does not suggest that the use of deadly force would be justified as a response to someone's obstruction of first responders—in *Ames* the officer used a "minor pain compliance technique that is at the lower end of takedown options" to subdue the individual who was obstructing the officers' ability to render aid. *Id.* at 345.

The petition confirms that the courts of appeals are aligned in holding that the state's interest in using force, especially deadly force, in a non-criminal emergency is substantially *less* than its interest in using force in a criminal emergency, and that any government interest in seizing someone to apprehend them for their criminal conduct is not implicated in non-criminal emergencies.

Ultimately petitioner concedes that the touchstone of any excessive force claim is the reasonableness of a particular use of force in light of the totality of the circumstances, Pet. 19, and does not dispute that every court of appeals nationwide applies that standard, *id.* at 13-19. The Eleventh Circuit applied that same totality of the circumstances test in this case. *Id.* at 11. Regardless of any minor differences in wording, under all of the circuits' tests Officer Lozada used excessive force that violated clearly established law. Even if there were a meaningful difference between the circuits' respective tests, any split is too shallow and nascent to warrant the Court's review at this time.

### III. Petitioner's Other Assignments of Error Do Not Warrant Review

Petitioner's remaining arguments, that the Eleventh Circuit erred by finding that Officer Lozada violated clearly established law, and erred in its consideration of

the evidence in the record, are factbound requests for error correction that do not warrant the Court's review.

1. The Eleventh Circuit did not err in concluding that every reasonable official would have known that shooting Mrs. Teel was an excessive use of force. It has been established for decades that "[w]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." *Garner*, 471 U.S. at 11; *see also Graham*, 490 U.S. at 396 (critical factor in use-of-force analysis is "whether the suspect poses an immediate threat to the safety of the officers or others"). "We do not think it requires a court decision with identical facts to establish clearly that it is unreasonable to use deadly force when the force is totally unnecessary to restrain a suspect or to protect officers, the public, or the suspect himself." *Weigel v. Broad,* 544 F.3d 1143, 1154 (10th Cir. 2008). "We have repeatedly held that police officers cannot use force that is 'wholly unnecessary to any legitimate law enforcement purpose.' " *Mercado v. City of Orlando*, 407 F.3d 1152, 1160 (11th Cir. 2005).

The critical facts of this case, when viewed in the light most favorable to the plaintiff, which emanate almost exclusively from the petitioner as the sole eyewitness, establish that Mrs. Teel was not dangerous. The record supports the inference that Mrs. Teel was *carrying* the knife she had used to slit her wrists as she gradually walked toward Officer Lozada and that she was not threatening him with it.

Even if Ms. Teel had been carrying the knife in a threatening way, Officer Lozada's decision to *shoot her dead* was clearly unreasonable in light of all the facts and circumstances. Mrs. Teel was a diminutive sixty year old woman, bleeding profusely, and walking slowly. Officer Lozada could have easily eliminated any conceivable

threat she posed multiple ways without using deadly force. He could have ordered her to stop walking or drop the knife. He could have warned her he would shoot her if she kept walking or failed to drop the knife. He could have sprayed her with his pepper spray or hit her with his taser. Or he could have simply left the room and run to the bottom of the stairs. And again, he *admits* all this. *See supra* note 1. The record supports the inference that all of those methods of resolving the situation were known and available to Officer Lozada and would not have involved killing her.[2]

Those facts make this case fundamentally different from *Kisela v. Hughes*, where the officer shot the victim only after she had refused to drop the knife after at least two commands to do so and where the officer could not otherwise have eliminated the threat he believed she posed to a nearby woman without shooting her. *See* 138 S. Ct. 1148, 1150-51 (2018) (per curiam). Moreover, unlike *Kisela*, where the Ninth Circuit had no similar case that would have placed the officers on notice that their conduct violated clearly established law, *id.* at 1154, the Eleventh Circuit has a case, *Mercado*, 407 F.3d 1152, similar to this one that put every reasonably officer on notice that using deadly force without warning to restrain a non-dangerous person in response to a noncriminal emergency is unconstitutionally excessive. *See* Pet. App. 18. In *Mercado*, the Eleventh Circuit found that the shooting of a suicidal man violated the constitution because, at the

[2] Officer Lozada also violated his own department's policies and procedures for responding to a suicide call. *See* Teel C.A.Br.6-8. The Court currently has a petition for certiorari pending that raises the question whether training or law enforcement policies can be relevant to whether a police officer is entitled to qualified immunity. *See* Petition for Certiorari, *Frasier v. Evans*, No. 21-57. If the Court finds such policies are relevant, that is another reason that the decision below is correct and to deny review.

time he was shot, the decedent "was not actively resisting arrest, and there is no evidence that he struggled with the police." 407 F.3d at 1157.

Even if the Eleventh Circuit erred in its application of the obvious clarity rule, this is a request for error-correction that does not warrant this Court's review. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). Every circuit applies the "obvious clarity" rule because it is a rule this Court has instructed lower courts to apply. *Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020) (per curiam) (explaining that qualified immunity will be denied where " 'a general constitutional rule already identified in the decisional law … [applies] with obvious clarity to the specific conduct in question' " (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)).

2. The Eleventh Circuit did not err in its determination of the reasonable inferences a jury could draw from the facts in the record.

*First*, the Eleventh Circuit correctly concluded that there is a material dispute of fact regarding whether Mrs. Teel carried the knife in a threatening way. Petitioner claims that because Officer Lozada shot the only other witness that means "[t]here were no other eye witnesses" and "[a]s a result, Plaintiff Teel could not reasonably dispute Lozada's description of how Mrs. Teel held the knife." Pet.23. Petitioner has it backwards. "An African proverb teaches that only when lions have historians will hunters cease being heroes." *Flythe v. District of Columbia*, 791 F.3d 13, 19 (D.C. Cir. 2015). Thus, "[e]very circuit to have confronted this situation—where the police officer killed the only other witness to the incident" has

held that the court " 'must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational factfinder that the officer acted unreasonably.' " *Id.* at 19 (quoting *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994) (Kozinski, J.)).

Here, the circumstantial evidence in the record supports the conclusion that Mrs. Teel was not threatening Officer Lozada with the knife. Dr. Teel told Officer Lozada that Mrs. Teel had not attempted to harm him, and Officer Lozada admitted that when he drew his gun and walked up the stairs he had no reason to believe she was a threat to anyone. Officer Lozada admits that, when he was in the room with her, she was walking slowly. And Officer Lozada admits that her statements to him inside the room were not threats *to him*, but rather pleas for him *to kill her*. That circumstantial evidence supports the conclusion that she was not threatening him with the knife but merely carrying it in her hand.

*Second*, and for similar reasons, the Eleventh Circuit correctly found that a jury could conclude that Officer Lozada had numerous options available to eliminate any threat to himself without using deadly force. Petitioner complains that the panel failed to appreciate that Officer Lozada may not have issued any commands or warnings or used non-lethal means or retreated from the room, even though these options were all admittedly available to him, because "the events happened quickly." Pet.28-29. But whether the events in the bedroom unfolded too quickly for Officer Lozada to avoid the use of deadly force is a quintessential fact question that a jury should decide. The facts as provided by petitioner at least suggest the events did not happen "quickly" (i.e. "[e]ight to ten seconds" to begin walking toward him once she stood up from the bed and Mrs. Teel moved slowly).

Like petitioner's request that the Court rectify the Eleventh Circuit's application of the "obvious clarity" rule, petitioner's request that the Court correct the Eleventh Circuit's application of the summary judgment standard is a classic request for error correction that this Court "rarely" undertakes. Sup. Ct. R. 10.

**IV. This Case Is A Bad Vehicle**

This case is a poor vehicle for addressing the questions presented. The decision below was rendered on an interlocutory appeal before trial on the merits. Supreme Court review at an interlocutory stage is the exception rather than the rule. *See, e.g.*, *Va. Mil. Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J.) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); Shapiro, Geller et al., Supreme Court Practice § 4.18, at 282 (10th ed. 2013).

On issues of qualified immunity, interlocutory appeals are permitted because the defense is meant to protect against "stand[ing] trial or fac[ing] the other burdens of litigation" in cases where the law was not clearly established. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). But here, Officer Lozada's actions will face trial even if petitioner succeeds in this Court because Dr. Teel's claim against the Sheriff under Florida's Wrongful Death Act will go to trial even if the Court finds that Officer Lozada is entitled to qualified immunity. The evidence for that state law claim overlaps significantly with the evidence relevant to the excessive force claim, meaning the trial in this case, or settlement, may well resolve plaintiff's claims in a way that would moot the issues raised by the petition. If the issues survive trial, petitioner will not be prejudiced by re-presentation in a post-judgment appeal.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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