No. _____

In The
Supreme Court of the United States

MICHAEL HIGGINS,

Petitioner,

vs.

KIMBERLY J. ZION, individually and as successor in interest to CONOR ZION,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

WOODRUFF, SPRADLIN & SMART, APC
DANIEL K. SPRADLIN
Counsel of Record
dspradlin@wss-law.com
555 Anton Boulevard, Suite 1200
Costa Mesa, California 92626-7670
Telephone: (714) 558-7000
Facsimile: (714) 835-7787

Attorneys for Petitioner Michael Higgins

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

In *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2022 (2014), this Court held if police officers are justified in firing at a suspect to end a severe threat to public safety, they need not stop shooting until the threat has ended. While acknowledging the initial use of deadly force was reasonable, and that once decedent was on the ground Petitioner could not be sure if he was bluffing or only temporarily subdued, the Ninth Circuit essentially disregarded *Plumhoff* and held that Petitioner, a lone officer confronted by an armed suspect in a residential neighborhood who had stabbed three people, including another officer, should have stopped midway through a use of force that lasted just seconds to reassess the need for force. This is contrary to *Plumhoff*'s holding that the use of force need not stop until the threat has ended. Petitioner witnessed decedent stab and incapacitate his fellow officer and then fired 18 shots in nine seconds and struck three blows to the head to ensure the decedent no longer was a threat so he could render aid to his fellow officer. This Court can correct the Ninth Circuit's errors in its analysis by hearing this case and answering the following:

1. Whether the Ninth Circuit erred when it disregarded the holding in *Plumhoff* and concluded that even though the use of deadly force initially was reasonable and required, it arguably was not objectively reasonable for Petitioner, over the course of mere seconds in a rapidly evolving and dangerous and tense

QUESTIONS PRESENTED – Continued

sequence of events, to continue to use deadly force until the threat had completely ended in response to a 911 call of a violent, knife-wielding suspect who had just violently knifed two individuals and was in the process of mortally wounding another deputy with the knife and then fleeing toward the entrance to a residence while still in possession of the knife with residents in the immediate vicinity of the heavily residential neighborhood.

2. Whether the Ninth Circuit erred in denying qualified immunity by finding the use of force was not reasonable as a matter of law or that Petitioner should have been on notice that that the law was clearly established that the use of force was unreasonable where, under Respondent's own facts, the suspect had viciously stabbed three people, including responding officer Deputy Lopez, which Petitioner witnessed, and where Deputy Lopez lay bleeding on the ground, perhaps mortally wounded, with bystanders in the area and no other officers present to assist or support Petitioner while the decedent was still armed with a knife.

3. Whether the Ninth Circuit erred when it concluded that Petitioner, in using deadly force to end the immediate threat posed by the violent, knife-wielding suspect, and in delivering three head blows, arguably acted with a purpose to harm unrelated to legitimate law enforcement objectives.

PARTIES TO THE PROCEEDINGS

Petitioner Michael Higgins is a Deputy with the Orange County Sheriff's Department. The County was a co-defendant below, but does not have an interest in the questions presented by this petition.

Respondent is Kimberly J. Zion, is the surviving mother of Conor Zion, deceased.

CORPORATE DISCLOSURE STATEMENT

No corporations are parties to the proceedings.

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On October 7, 2015, the United States District Court for the Central District of California entered an order granting Petitioner's motion for summary judgment. The district court's order is reproduced in the appendix to this petition. (Pet. App. at 10-27.)

On November 1, 2017, the United States Court of Appeals for the Ninth Circuit issued an opinion affirming the district court's order as to the *Monell* claim only and reversing it as to all claims against Petitioner. The Ninth Circuit's November 1, 2017 opinion is a published decision and is available at *Zion v. County of Orange*, 874 F.3d 1072 (9th Cir. 2017). The November 1, 2017 opinion that is the subject of this petition also is reproduced in the appendix to this petition. (Pet. App. at 1-9.)

JURISDICTIONAL STATEMENT

The Ninth Circuit had appellate jurisdiction over Respondent's initial appeal because the district court's October 7, 2015 order was a final decision. The Ninth Circuit issued its decision on November 1, 2017, reversing the decision of the district court. This petition is timely because it is being filed within 90 days after the Ninth Circuit's decision reversing the decision of the district court. The Court has jurisdiction to consider this appeal under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

Respondent seeks damages under 42 U.S.C. § 1983 for an alleged violation of the decedent's rights under the Fourth Amendment to the United States Constitution and for violation of the parent-child relationship without due process of law under the Fourth and Fourteenth Amendments.

The Fourth Amendment provides in part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST., amend. IV. The Fourteenth Amendment provides in part that, "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST., amend. XIV.

Section 1983 provides in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983.

STATEMENT OF THE CASE

A. Introduction

Respondent's decedent was killed after being shot by Petitioner following a vicious, violent incident in which the decedent stabbed his mother (Respondent here), his roommate and Petitioner's fellow officer, Deputy Lopez. The Ninth Circuit reversed the district court's grant of summary judgment, which was based on a finding that Petitioner had not used excessive force and that his conduct had legitimate law enforcement purposes. The Ninth Circuit concluded that while Petitioner initially was justified in using deadly force, which Respondent did not dispute, after the decedent fell to the ground, even though Petitioner could not be sure that the decedent was not bluffing or was only temporarily subdued, because the decedent was lying on the ground he was not in a position where he could easily harm anyone or flee. (Pet. App. at 4.) Thus, it concluded that a reasonable jury could find that the decedent was no longer an immediate threat, and Petitioner should have held his fire unless and until the decedent showed signs of danger or flight. Alternatively, the Ninth Circuit found that a jury could find that while the second round of nine bullets was justified, the blows to the head were not. In so finding, the circuit court acknowledged *Plumhoff v. Rickard*, which held that, "if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended." 134 S. Ct. 2012, 2022 (2014). The Ninth Circuit also acknowledged the "murky boundary" between

situations where a police officer may use deadly force against a threatening suspect and when that force must be stopped because the suspect no longer poses a threat. (Pet. App. at 2.)

Petitioner believes the Ninth Circuit committed clear error in its excessive force analysis. Although it found that Petitioner was justified in using deadly force and that the firing of the first nine shots did not constitute excessive force under the law, it held that Petitioner should have stopped to reevaluate the decedent's condition in the middle of the incident – an incident that unfolded over mere seconds – after the decedent fell to the ground. But, the decedent still was moving and still had possession of the knife. And the Ninth Circuit acknowledged that Petitioner could not be sure, even after the decedent was on the ground, if the decedent was bluffing or was only temporarily incapacitated. It is undisputed that no other officers were present to support or back up Petitioner. In support of its conclusion, the Ninth Circuit viewed the video tape evidence as (1) not showing what it described as "threatening" movement by the decedent after he was on the ground although it did show the decedent moving, and (2) showing Petitioner walking in circles around decedent while he was lying on the ground and then taking a running start and stomping on his head three times – which is contrary to what the video tape actually shows. (Pet. App. at 4, 7.) Under *Scott v. Harris*, 550 U.S. 372, 380-381 (2007), a court should not adopt a version of facts for purposes of

ruling on a motion for summary judgment that is contradicted by a video.

The Ninth Circuit's decision is unrealistic under the circumstances and does not comport with the law, which holds that "[a]ll determinations of unreasonable force 'must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.'" *Scott v. Henrich*, 39 F.3d 912, 914 (9th Cir. 1994) ("*Henrich*"). The Ninth Circuit's analysis fails to take into full consideration the totality of the situation Petitioner was confronting, *Graham v. Connor*, 490 U.S. 386, 397 (1989), and the fact he was forced to make split-second judgments in a dangerous, tense, uncertain, and rapidly evolving situation that occurred over a matter of mere seconds. While the Ninth Circuit briefly describes that Deputy Lopez had been stabbed in the arms by the decedent, its opinion does not fully represent that Petitioner was confronted with a situation where he observed a fellow officer being violently and viciously stabbed by an individual who earlier had stabbed two other people and that he observed his fellow officer fall to the ground. Petitioner did not know if Deputy Lopez had been mortally wounded and was in need of immediate, life-saving assistance. The evidence also showed that there were other individuals present in the area and were believed by Petitioner to be in possible danger. No other officers were present to support or back up Petitioner. These factors, which were ignored by the

Ninth Circuit, further underscore how unrealistic it was to expect Petitioner to stop and ponder and reevaluate whether the decedent was pretending to be incapacitated or was only temporarily incapacitated once he was on the ground. Indeed, in analyzing the Fourteenth Amendment claim the Ninth Circuit recognized there was an inadequate amount of time to stop and ponder, noting that Petitioner did not violate the Fourteenth Amendment by emptying his weapon at the decedent. "The two volleys came in rapid succession, without time for reflection." (Pet. App. at 7.) The case law is clear that Petitioner, when confronted with a situation that everyone agrees required him to use deadly force, was justified in using that force "until the threat ha[d] ended." *Plumhoff*, 134 S. Ct. at 2022.

On the second issue, the court ignored the language in the *Plumhoff* case that an officer initially justified in using force does not need to stop the use of force until the threat has ended. Instead, for purposes of its qualified immunity discussion, the court analogized this case to more generalized cases that hold that continuing the use of force once a suspect has been brought to the ground may violate the Fourth Amendment. (Pet. App. at 5-6.) None of the cases cited by the Ninth Circuit were in any way similar to the facts presented here. For example, the Ninth Circuit cited to *Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003). There, police were called because of concern that the plaintiff would hurt himself "by darting out into traffic." 343 F.3d at 1044. There was no mention of a gun or weapon by either caller, yet the officers

"knocked [plaintiff] to the ground" and applied force to an unresisting plaintiff who was already handcuffed, causing plaintiff to lose consciousness. *Id*. at 1044, 1061. The Ninth Circuit also cited to *Davis v. City of Las Vegas*, 478 F.3d 1048 (9th Cir. 2007), where the plaintiff, already in handcuffs and merely refusing to consent to a search of his person, was slammed head-first twice into a wall with sufficient force to break his neck and pinned against the floor where the police officer rolled him onto his back and punched him in the face. *Id.* at 1052.

The Ninth Circuit's qualified immunity analysis violated the parameters set out by this Court in *Saucier v. Katz*, 533 U.S. 194 (2001), which held that the inquiry of whether or not a constitutional right was clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id*. at 201. Ignoring this, the Ninth Circuit cited to cases involving force used on unarmed, handcuffed suspects. None of the cases cited by the Ninth Circuit even remotely involve a similar fact situation as presented here or in *Plumhoff*.

On the third issue, the Ninth Circuit correctly found that the 18 shots fired by Petitioner did not violate the Fourteenth Amendment because the shootings served the legitimate purpose of stopping a dangerous suspect. (Pet. App. at 7.) The Ninth Circuit found the head blows to have no legitimate law enforcement purpose, relying on *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957) and *Rochin v. California*, 342 U.S. 165, 172 (1952). In reaching this conclusion, however, the Ninth

Circuit relied on conduct it states is shown on the video – Petitioner walking in circles around the decedent before taking a running start and stomping on his head three times (Pet. App. at 7) – that simply is not there.

The "shocks the conscience" standard for a successful Fourteenth Amendment claim is a high bar, which "only the most egregious official conduct" meets. *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998); see also, e.g., *Breithaupt*, 352 U.S. at 435 (holding that conduct shocks the conscience when it is so "brutal" and "offensive" as to not "comport with traditional ideas of fair play and decency"). Here, in an effort to meet this standard, the Ninth Circuit viewed the evidence in a way that is not supported by the videotapes. The videotaped evidence, in conjunction with the totality of the circumstances, does not support a finding that Petitioner acted in a way that shocks the conscience and without any legitimate law enforcement purpose.

Because there has been clear error, Petitioner asks this Court to summarily reverse the Ninth Circuit's decision. See *Brosseau v. Hagen*, 543 U.S. 194 (2004) (per curiam). Alternatively, Petitioner requests that this Court grant his petition to allow for plenary consideration of the issues raised here.

B. Factual and Procedural History

The district court's order, as was much of the Ninth Circuit's ruling, was based on undisputed facts, facts that Petitioner conceded for purposes of the summary judgment analysis, on Respondent's facts, and on

two videos from the dashboard mounted cameras in the two police cars at the scene.[1]

On the evening of September 24, 2013, Respondent, decedent and decedent's roommate Joel Walden were involved in an altercation in which decedent injured both Respondent and Walden with a kitchen knife. (Pet. App. at 12.) Respondent and Walden sought medical attention from a neighbor, who then called 911. (*Id*.) At approximately 7:30 p.m. that same evening, Petitioner and Deputy Lopez responded to the 911 dispatch and arrived at the decedent's residence three minutes later in two vehicles at approximately the same time. (*Id*.; Higgins Video 19:34:28-19:37:36.)

Upon the officers' arrival at the decedent's residence, he emerged from a building and ran towards Deputy Lopez with a knife in his hand, verbally threatening the officers, stating "I'll kill you . . . you mother fucker." (Pet. App. at 12; Higgins Video 19:37:42-19:37:44.) The decedent chased Deputy Lopez and

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[1] Videotaped evidence from the police cruisers that confirms these facts are in the record of the case. Petitioner invites the Court to view the videotapes that can be found at https://www.ca9.uscourts.gov/media/15-56705/evidence/Lopez (Lopez Video) and https://www.ca9.uscourts.gov/media/15-56705/evidence/Higgins (Higgins Video) or can be supplied by Petitioners. If reviewed by the Court, Deputy Lopez's videotape shows the decedent, the firing of the shots and the head blows from minute markers 19:26:58 to 19:27:22. Petitioner Higgins's videotape is mainly of the audio and captures the decedent's voice threatening to kill the officers, the shots fired, Petitioner's voice saying "998," asking for a tourniquet and rendering aid to his fallen officer, and Deputy Lopez's voice saying he can't feel his arms and it is getting harder to breath from minute markers 19:37:42-19:40:11.

eventually stabbed him, causing multiple stab wounds. (Pet. App. at 12.) Petitioner witnessed the attack on Deputy Lopez, including stabbing motions in his direction. (*Id.*)

Petitioner began firing at the decedent from approximately 15 feet away. (Pet. App. at 12; Lopez Video 19:26:58; Higgins Video 19:37:52.) After multiple shots had been fired, the decedent retreated at a high rate of speed towards the building he had emerged from moments earlier. (Pet. App. at 13; Lopez Video 19:27:01-19:27:03; Higgins Video 19:37:53-19:37:57.) Firing ceased for less than a second, then resumed as Petitioner pursued the decedent. (Lopez Video 19:27:01-19:27:03.) The decedent collapsed onto the ground, first onto his back, then rolling onto his side, as firing continued. (Lopez Video 19:27:03-19:27:07.) While the decedent was on the ground, Petitioner continued firing nine additional shots and completely depleted his clip of ammunition. (Lopez Video 19:26:58-19:27:07.) In total, Petitioner fired eighteen shots in approximately nine seconds. (Pet. App. at 13; Lopez Video 19:26:58-19:27:07.)

Petitioner paused before turning around towards the injured Lopez, calling out "998" on the police radio. (Lopez Video 19:27:07; Higgins Video 19:38:05.) The decedent appeared to move again, seconds after the gunfire had ceased. (Lopez Video 19:27:09-19:27:13.) Petitioner then turned back towards the decedent, walked toward him and struck his head twice with his foot. (Lopez Video 19:27:15-19:27:18.) Petitioner paused, backed up a step, then struck the decedent's

head one more time with his foot. (Lopez Video 19:27:22.) After this third strike Petitioner ran back to Lopez to render medical assistance. (Lopez Video 19:27:22; Higgins Video 19:38:05-19:40:11.)

Connor Zion died at the scene. (Pet. App. at 13.)

There is no dispute that the decedent attacked his roommate and his mother prior to the arrival of law enforcement at decedent's residence. (Pet. App. at 12.) There also is no dispute that the decedent wielded a dangerous weapon, a knife, and used that knife on a law enforcement officer, causing potentially mortal wounds. (Pet. App. at 12.) There also is no dispute that all 18 shots were fired in a nine-second span and that the decedent continued moving after he had fallen to the ground and after all 18 shots had been fired. (Lopez Video 19:26:58-19:27:07, 19:27:09-19:27:13.)

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit Erred in Analyzing whether the Force Used was Unreasonable and if Petitioner was Justified in Using Deadly Force Until the Threat had Ended

Excessive force claims under the Fourth Amendment must be analyzed under the "objective reasonableness" standard, i.e., "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham*, 490 U.S. at 397. "*Graham* sets out a non-exhaustive list of factors

for evaluating [on-the-scene] reasonability: (1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect actively resisted arrest or attempted to escape." *Maxwell v. Cnty. of San Diego*, 697 F.3d 941, 951 (9th Cir. 2012).

Deadly force is constitutionally reasonable "if the suspect threatens the officer with a weapon" or "where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others." *Ting v. United States*, 927 F.2d 1504, 1510 (9th Cir. 1991); *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985). Law enforcement officers may use deadly force to stop a suspect who poses "an actual and imminent threat to the lives of any pedestrians who might [be] present, to other civilian motorists, and to the officers involved. . . ." *Scott v. Harris*, 550 U.S. at 384. "[W]here a suspect threatens an officer with a weapon such as a gun or a knife, the officer is justified in using deadly force." *Smith v. City of Hemet*, 394 F.3d 689, 704 (9th Cir. 2005). Officers may use deadly force to prevent the escape of a felony suspect "when it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a threat of serious harm, either to the officer or others." *Forrett v. Richardson*, 112 F.3d 416, 420 (9th Cir. 1997).

As this Court has held, "if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting *until the threat has ended*." *Plumhoff v. Rickard*,

134 S. Ct. at 2022 (emphasis added). Indeed, as this Court noted,

> "This would be a different case if petitioners had initiated a second round of shots after an initial round had clearly incapacitated Rickard and had ended any threat of continued flight, or if Rickard had clearly given himself up. But that is not what happened."

Id.

The Ninth Circuit misapplied this Court's holding in *Plumhoff v. Rickard*. There is no dispute that the first nine shots constituted a justified use of deadly force. As to the 10th through 18th shots and the three head blows, the Ninth Circuit held that a jury could find that they were unreasonable. In reaching that conclusion, however, the Ninth Circuit acknowledged that even though the decedent was on the ground he still was making some movements and Petitioner couldn't be sure that the decedent wasn't bluffing or was only temporarily subdued. (Pet. App. at 4.) Thus, the Ninth Circuit acknowledged that the decedent was not "clearly incapacitated" after the first nine shots were fired.

The Ninth Circuit then improperly interpreted the video, which clearly showed the decedent was not lying still but was continuing to move even as Petitioner tried to walk away to render aid to his fallen fellow officer, stating it did not show a threat or an effort to flee. (Pet. App. at 4-5.) Undisputedly, though, the decedent continued to move and this movement is captured in

the video. To an officer on the scene, engaged in a rapidly evolving and dangerous situation, such movement was a clear indication to that officer that the decedent was not, at that time, clearly incapacitated so that he no longer was a threat to Petitioner or to nearby citizens.

Confusingly, the Ninth Circuit opinion contradicts itself as to whether or not Petitioner should have or had time to reflect between shots nine and 10 as to the decedent's state of capacity or incapacity. For example, the Ninth Circuit in its Fourth Amendment analysis states that Petitioner, after the first nine shots, should have held his fire and reassessed the situation. (Pet. App. at 5.) Yet, it then states in its analysis under the Fourteenth Amendment that "[t]he two volleys came in rapid succession, without time for reflection." (Pet. App. at 7.) This reflects the murky water into which the Ninth Circuit has waded when it insisted on separating out what it describes as two rounds of volleys (shots one through nine and shots 10 through 18) and whether or not there was time to reflect.

Petitioner's appraisal of the situation must be viewed with the recognition that "police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain and rapidly evolving. . . ." *Graham*, 490 U.S. at 396-397. Unlike judges, officers do not have the luxury of taking the time to assess and reassess each action and reaction to calculate the degree of force required. *Id.* at 396 ("The 'reasonableness' of a particular use of force must be

judged from the perspective of the reasonable officer on the scene, rather than with the 20/20 vision of hindsight.").

Here, from the safety of its chambers and in hindsight, the Ninth Circuit interpreted the video and speculated as to what a jury may or may not think. This video undisputedly shows the decedent was moving after the shots. The decedent was still moving and he still was armed with the knife, which the decedent had used just seconds earlier to inflict serious injury on Deputy Lopez. Petitioner observed the movement while walking away and turned back around to deliver three head blows, which then did have the apparent effect of incapacitating the decedent so that Petitioner could safely turn his back on him and render aid to Deputy Lopez. Petitioner could have left the decedent, who was still moving, still armed with a knife, and still in front of the residential entrance, but he "need not have taken that chance and hoped for the best." *Scott v. Harris*, 550 U.S. at 385. Petitioner had to ensure the threat was completely neutralized before leaving the decedent to render life-saving aid to Deputy Lopez. With his firearm fully discharged, Petitioner then used his foot on the decedent's head to accomplish his duty to fully neutralize the threat by rendering the decedent unconscious.

The Ninth Circuit did not rely on any evidence to determine that the decedent potentially was incapacitated but resorted to speculation as to what a jury could conclude upon viewing the video. The only evidence presented – the video and Petitioner's testimony – belied any such speculation. The evidence did not

show that Petitioner "had clearly incapacitated [the decedent] and had ended any threat of continued flight, or [that decedent] had clearly given himself up," the factors that this Court has held are essential to the determination if an officer at the scene needed to stop firing his weapon because a threat had ended. *Plumhoff*, 134 S. Ct. at 2022. This is not what happened. This did not happen until after the last blow to the head was made, at which point Petitioner ceased all use of force.

"When opposing parties tell two different stories, one of which is blatantly contradicted by [a video], so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. at 380-381. Further, "mere allegation and speculation do not create a factual dispute for purposes of summary judgment." *Thornhill Pub. Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). Unfortunately, Ninth Circuit precedent encourages lower courts to ignore or minimize law enforcement officer eyewitness accounts when no other eyewitness accounts are available. Under circuit precedent, lower courts "may not simply accept what may be a self-serving account by the police officer." *Henrich*, 39 F.3d at 915. Instead, *Henrich* admonishes judges to carefully examine all the evidence in the record, such as medical reports, contemporaneous statements by the officer and the available physical evidence, as well as any expert testimony proffered by the plaintiff, to determine whether the officer's story is internally consistent and

consistent with other known fact. Here, the Ninth Circuit relied on *Henrich* solely as a basis for disbelieving Petitioner's account, even though there was no evidence presented that actually contradicted that account. (Pet. App. at 5.)

Indeed, the video contradicts the Ninth Circuit's conclusion that the threat had ended. It supports Petitioner's evidence that the decedent continued to move and the threat continued to be very real both to Petitioner and to the citizens who were in the area. Until that threat was ended, Petitioner continued to use force ceasing only once the decedent was clearly incapacitated. Under *Plumhoff*, such use of force was reasonable and not excessive and justified granting summary judgment in Petitioner's favor.

II. The Ninth Circuit Erred in Analyzing whether the Force Used violated Clearly Established Law at the Time It was Used

Qualified immunity is a judicially-crafted protection for public officials who must exercise judgment in their official duties. "It is an 'immunity from suit rather than a mere defense to liability.'" *Saucier*, 533 U.S. at 200-201. An official sued under section 1983 is entitled to qualified immunity unless it is shown that the official violated a statutory or constitutional right that was "'clearly established'" at the time of the challenged conduct. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). A defendant cannot be said to have violated a clearly established right unless the right's contours

were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it. *Id*. at 741.

Recently, this Court in *Stanton v. Sims*, ___ U.S. ___, 134 S. Ct. 3 (2013) (per curiam), reiterated that while the Court did not require a case directly on point before concluding that the law is clearly established, it held that "'existing precedent must have placed the statutory or constitutional question beyond debate.'" *Id.* at 5; citation omitted.

As this Court noted in *Ashcroft v. al-Kidd* in this regard:

> "We have repeatedly told courts – and the Ninth Circuit in particular, – not to define clearly established law at a high level of generality. The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established."

563 U.S. at 742; citations omitted.

As was explained in *Plumhoff*, to define clearly established law at a high level of generality results in "avoid[ing] the crucial question whether the official acted reasonably in the particular circumstances he or she faced." 134 S. Ct. at 2023. Where there is no suggestion in a case that the officer knowingly violated the Constitution; the question then is whether, "in light of precedent existing at the time, [the officer] was 'plainly incompetent. . . .'" *Stanton*, 134 S. Ct. at 5.)

At the time of this incident, it was well established that a police officer could use deadly force if the officer had probable cause to believe that the suspect posed a significant threat of death or serious physical injury to the officer or others. *Tennessee v. Garner*, 471 U.S. 1, 3 (1985). *Smith v. City of Hemet*, 394 F.3d 689, 704 (9th Cir. 2005), held that a police officer who is threatened with a weapon such as a knife or a gun is justified in using deadly force. In *Reynolds v. County of San Diego*, 84 F.3d 1162, 1168 (9th Cir. 1996), overruled on other grounds in *Acri v. Varian Associates, Inc.*, 114 F.3d 999 (9th Cir. 1997), the court held that deadly force was reasonable where a suspect, who had been behaving erratically, swung a knife at an officer.

Here, the Ninth Circuit has agreed that initially the use of deadly force was justified. It denied qualified immunity to Petitioner because it held, as a general proposition, that based on case law it was clearly established that once a suspect was on the ground, the right to use such force ceased. But the case law cited by the Ninth Circuit is not on point and does not put the constitutional question beyond debate. Specifically, the Ninth Circuit cited to *Drummond*, 343 F.3d 1052 and *Davis*, 478 F.3d 1048. In *Drummond*, there was no evidence that the plaintiff was armed with a weapon or had viciously attacked anyone. The police were called because of concern that the plaintiff would hurt himself "by darting out into traffic." 343 F.3d at 1044. In their response, the officers "knocked [plaintiff] to the ground" and applied force once plaintiff was already handcuffed, causing plaintiff to lose

consciousness. *Id*. In *Davis*, the plaintiff already was in handcuffs and merely refusing to consent to a search of his person, when officers slammed him headfirst twice into a wall with sufficient force to break his neck and pinned him against the floor where a police officer rolled him onto his back and punched him in the face. 478 F.3d at 1052.

These cases are inapposite. Here, prior to Petitioner's arrival at the scene the decedent had used a knife to attack his roommate and his mother. They sought aid from a neighbor and the police were called. The call was responded to by Deputy Lopez and Petitioner. Upon arrival at the scene, the decedent ran at Deputy Lopez and viciously and repeatedly stabbed him with the knife. This was witnessed by Petitioner. The decedent then started running towards a building and Petitioner opened fire, firing nine shots. As the decedent fell to the ground, and as he continued to move, Petitioner fired an additional nine shots, with all 18 shots being fired over the course of nine seconds. As Petitioner began to walk away so he could render aid to his fallen fellow officer he saw that the decedent continued to move so he turned back around and delivered three blows to the decedent's head with his foot. It was necessary for the safety of himself and of the bystanders – and thus reasonable – for Petitioner to make sure the threat from the decedent had fully ended before turning away from him so he could render aid to Deputy Lopez. At no time was the decedent handcuffed. There is no evidence that he at any time dropped his weapon. And the videotape shows that decedent continued to move even after he was on the ground, and

thus, posed a potential threat to Petitioner and bystanders.

There is no suggestion in this case that Petitioner knowingly violated the Constitution and the existing legal precedent does not show that Petitioner was plainly incompetent. Because the right that is alleged to have been violated was not clearly established in the circumstances presented here, Petitioner was entitled to qualified immunity and the Ninth Circuit's decision to the contrary was incorrect and was not supported by this Court's decisions.

III. The Ninth Circuit Erred in Analyzing whether Petitioner acted with a Purpose to Harm Unrelated to Legitimate Law Enforcement Objectives

Traditionally, substantive due process protects against unwarranted governmental intrusion into "matters relating to marriage, family, procreation, and the right to bodily integrity." *Albright v. Oliver*, 510 U.S. 266, 272 (1994). The doctrine of substantive due process can also be invoked in limited circumstances to protect individuals from intentional state intrusions that "shock the conscience" by their brutality. This Court has repeatedly cautioned that only the most egregious official conduct can be said to be arbitrary in the constitutional sense, and therefore give rise to possible liability under the Fourteenth Amendment. *County of Sacramento v. Lewis*, 523 U.S. at 846.

Where a law enforcement officer makes a snap judgment because of an escalating situation, his conduct may only be found to shock the conscience if he acts with a purpose to harm unrelated to legitimate law enforcement objectives. *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010). This is so because an officer faces a "fast paced, evolving situation presenting competing obligations with insufficient time for the kind of actual deliberation required for deliberate indifference." *Porter v. Osborn*, 546 F.3d 1131, 1142 (9th Cir. 2008). "Legitimate law enforcement objectives [include] arrest, self-defense, or the defense of others." *A.D. v. California Highway Patrol*, 712 F.3d 446, 454 (9th Cir. 2013).

In reversing the order granting summary judgment on the Fourteenth Amendment claim, the Ninth Circuit analogized this action to *A.D.*, where it had affirmed a district court's denial of a defendant's renewed motion for judgment as a matter of law. *Id.* at 460. In doing so it noted the following facts were sufficient to support the jury verdict:

> (1) [The suspect's] car was contained in a deadend street; (2) [The suspect] refused to get out of her car and repeatedly said "fuck you" to [the defendant officer]; (3) the officers were positioned such that they were not in the path of [the suspect's] vehicle; (4) other officers at the scene testified that they did not feel threatened nor did they perceive an immediate threat at the time of the shooting; (5) five other officers had guns drawn but no one other than [the defendant officer] fired; (6) officers

> testified that [the suspect's] car was either stopped or going forward at the time of the shooting; (7) the location of the [suspect] vehicle at the time of the shooting was not consistent with [the defendant officer]'s testimony; and (8) [the defendant officer] shot [the suspect] 12 times and emptied his gun.

Id. at 458.

The facts here have very little in common with those in *A.D.* Here, Petitioner was the only officer on the scene where a violent crime had been committed. The decedent already had viciously stabbed one officer who was on the ground bleeding, mortally wounded. He also had stabbed two other individuals. Petitioner had to incapacitate the decedent for his own safety and the safety of others and so he could render aid to his fallen officer. Based on the totality of the circumstances, Petitioner's fear for himself and for the safety of others was objectively reasonable. There was no evidence presented – other than mere speculation – that Petitioner was acting for purposes other than legitimate law enforcement purposes. There was no evidence presented that Petitioner was acting out of anger or solely for the purpose to harm or punish the decedent. It was not unreasonable for Petitioner to conclude under these circumstances that this was a situation that required a deadly force response. Further, the blows to the head with his foot were not unreasonable after the 18 shots failed to clearly incapacitate the decedent. Under the circumstances, such head blows do not rise to the level of the "most egregious official

conduct that can be said to be arbitrary in the constitutional sense." *County of Sacramento*, 523 U.S. at 846.

CONCLUSION

Based on the above, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

WOODRUFF, SPRADLIN & SMART, APC
DANIEL K. SPRADLIN
Attorneys for Petitioner Michael Higgins