No. 15-____

In The
Supreme Court of the United States

WAYNE BLANCHARD,

Petitioner,

v.

NANCY BROWN, individually and as the Special Administrator for the Estate of John Brown, Deceased,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When evaluating interlocutory appeals based on the denial of qualified immunity, there is a significant split within the circuits on the question of whether the courts of appeals must accept, without review, the genuineness and materiality of factual disputes found by the district court. *Romo v. Largen*, 723 F.3d 670, 677 (6th Cir. 2013) (Sutton, J., concurring) (recognizing a circuit split on the issue, collecting cases and outlining arguments for a restrained reading of *Johnson v. Jones*, 515 U.S. 304 (1995)). In light of the Seventh Circuit's unwillingness to consider whether the purported factual dispute identified by the district court was supported by evidence in the record, this case presents an ideal vehicle for this Court to resolve the conflict.

Additionally, in a civil case against a police officer for excessive force, a court must grant the officer qualified immunity unless the use of force was prohibited by clearly established law, placing the particularized constitutional question "beyond debate." Here, the Seventh Circuit denied qualified immunity without accounting for the particular threats posed by a subject armed with an open knife in very close proximity to a law enforcement officer. Accordingly, the specific questions presented are as follows:

1. Following the holdings in *Scott v. Harris*, 550 U.S. 372 (2007) and *Plumhoff v. Rickard*, 572 U.S. ___, 134 S. Ct. 2012 (2014), must an appellate court, in an interlocutory review of an order denying qualified

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immunity, accept a district court's determination that genuine issues of material fact preclude qualified immunity without demur, or rather, should appellate courts ensure that any purported factual disputes and the district court's inferences are both genuine and material?

2. In a use of force case, is the constitutional question defined in a sufficiently particularized sense when qualified immunity is denied based on legal precedent that does not involve similar threats to a police officer, including significant differences in the nature of the weapon possessed by the subject?

PARTIES TO THE PROCEEDINGS

Petitioner, Wayne Blanchard, was the appellant in the court below and is a deputy sheriff for the Walworth County, Wisconsin, Sheriff's Department. Respondent, Nancy Brown, individually and as the Special Administrator for the Estate of John Brown, deceased, was the appellee in the court below.

Walworth County, Wisconsin, was an appellant in the court below on a limited pendent party jurisdiction issue. While Walworth County remains a party in the proceedings below, it is not petitioning this Court.

No corporations are parties to the proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Deputy Wayne Blanchard, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case. In light of more recent authority from this Court, there is sufficient conflict among the circuits as to the proper interpretation of *Johnson v. Jones*, 515 U.S. 304 (1995), to invite this Court's resolution of the circuit splits. *See Romo v. Largen*, 723 F.3d 670, 677 (6th Cir. 2013) (Sutton, J., concurring).

Further, notwithstanding the proper scope of appellate review, this case also presents issues of exceptional importance because law enforcement officers must have adequate legal guidance to protect themselves and the public from armed individuals. Failing to provide that guidance, the Seventh Circuit improperly denied qualified immunity without accounting for the particular threat to officer safety posed by an emotionally unstable individual armed with a knife. As a result, the Seventh Circuit's decision would allow for a jury to find that an officer unreasonably used deadly force in the face of a noncompliant and unpredictable individual armed with an open knife in a confined space and only five to six feet away from an officer.

In defining the constitutional issue too broadly, the Seventh Circuit "inadvertently undermine[d] the values qualified immunity seeks to promote." *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S. Ct. 2074, 2080 (2011).

The Seventh Circuit's unprecedented limitation on the use of force, if not reviewed by this Court, will have a chilling effect on law enforcements' interactions with armed individuals, thereby increasing the risk to officers and the public.

OPINIONS AND JUDGMENTS BELOW

On July 17, 2014, the United States District Court for the Eastern District of Wisconsin entered an order denying the Petitioner's motion for summary judgment. The district court's order is available at *Brown v. Blanchard*, 31 F. Supp. 3d 1003 (E.D. Wis. 2014). In addition, the district court's order is reproduced in the Appendix to this Petition. (Pet. App. at 35-56.)

On August 13, 2015, the United States Court of Appeals for the Seventh Circuit issued an opinion affirming the district court's order. The Seventh Circuit's opinion, which was consolidated with another appeal, is available at *Estate of Williams v. Indiana State Police Department*, 797 F.3d 468 (7th Cir. 2015). The Seventh Circuit denied rehearing *en banc* on September 22, 2015. Both the Seventh Circuit opinion and the order denying rehearing *en banc* are reproduced in the appendix. (Pet. App. at 1-34 and 57-58.)

STATEMENT OF JURISDICTION

The Seventh Circuit had appellate jurisdiction over Petitioner's appeal because the district court's July 17, 2014 order was a final decision within the meaning of 28 U.S.C. § 1291 and the collateral order doctrine. *Mitchell v. Forsyth*, 472 U.S. 511, 524-530 (1985).

Following the Seventh Circuit's issuance of its August 13, 2015 opinion, Petitioner filed a timely request for rehearing *en banc*, which the Seventh Circuit denied on September 22, 2015. (Pet. App. at 1-34 and 57-58.) This Petition is timely because it is being filed within 90 days after the Seventh Circuit's denial of Petitioner's request for rehearing *en banc*. Sup. Ct. R. 13(1) and (3).

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 pursuant to 42 U.S.C. § 1983 for an alleged violation of the decedent's rights under the Fourth Amendment to the United States Constitution.

The Fourth Amendment provides in pertinent part that "[t]he right of 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.

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

1. Late in the evening on May 4, 2012, John Brown was intoxicated and contemplating suicide in the Walworth County mobile home that he shared with his mother, Nancy Brown. (Pet. App. at 35.) John Brown, who was 22, sent text messages and voicemails to a number of his friends indicating that he was contemplating suicide and that he "just wanted it to be done." (Pet. App. at 35-36.) Brown told one of his friends that he had been cutting himself, that there was blood everywhere and that he was "ending it tonight." (Pet. App. at 36.)

After receiving this information, one of Brown's friends called Brown's mother and told her that Brown was in his bedroom hurting himself. (Pet. App. at 22-23.) Immediately after this call, Brown's mother unlocked Brown's bedroom door and entered his bedroom. (Pet. App. at 23.) Inside, Brown's mother observed Brown sitting at his computer desk, holding a knife with a five-inch blade and bleeding from the wrist. (*Id.*) Brown's mother attempted to take the knife away from Brown, but he refused to surrender the knife. (*Id.*) Brown's mother then left the bedroom and called 911. (*Id.*)

During the 911 call, Brown's mother advised the dispatcher that her son was in the process of attempting suicide, that he had already cut his wrist and that he was still armed with a knife. (*Id.*) Brown's mother also warned the dispatcher that Brown had been drinking heavily and that he was bipolar, but refused to take his medications. (*Id.*) This information was relayed to Deputy Wayne Blanchard and Deputy Christopher Such, who were dispatched to Brown's home, along with emergency medical personnel who planned to enter the home once deputies secured the scene. (Pet. App. at 37.)

Deputy Such was the first to arrive at Brown's home, where he initially spoke with Brown's mother and then proceeded down the hallway to Brown's bedroom door, which was locked. (Pet. App. at 23.) Deputy Such identified himself to Brown through the closed door, but Brown did not initially respond. (*Id.*) Deputy Such again attempted to communicate with

Brown by asking him if he remembered Deputy Such from a prior positive encounter when Deputy Such gave Brown a ride to a neighboring town. (*Id.*) While there was loud music coming from the bedroom, Brown's mother testified that she did not hear Brown respond to Deputy Such. (*Id.*)

Deputy Blanchard then arrived and quickly spoke with Brown's mother and Deputy Such about what had transpired. (Pet. App. at 37-38.) Brown's mother was understandably emotional and asked for the deputies to enter Brown's bedroom to help her son. (Pet. App. at 38.) Deputy Blanchard went to Brown's bedroom door with his firearm drawn, while Deputy Such exited the home to attempt to visually observe Brown through a window. (*Id.*) Deputy Such observed Brown conscious, sitting at his computer desk with his back towards the bedroom door and drinking a beer. (*Id.*) Deputy Such radioed that information to Deputy Blanchard and then re-entered the home to join Deputy Blanchard. (*Id.*)

In light of the fact that Brown was at least armed with a knife and had not responded favorably to Deputy Such's prior communications, Deputy Blanchard did not want to tip off Brown that he was attempting to open the door. (*Id.*) Accordingly, Deputy Blanchard determined that, from a tactical standpoint for officer safety, it would be safer for him to enter Brown's locked bedroom by kicking the door open. (*Id.*) Deputy Blanchard kicked open Brown's bedroom door and then stepped back into the mobile home's narrow 2.6-foot-wide hallway. (Pet. App. at 38-39.)

At the time that Deputy Blanchard breached the door and throughout the remainder of the incident, Brown's mother was seated on a sofa in the living room, which was located at the end of a hallway away from Brown's bedroom. (Pet. App. at 24.) From that location, Brown's mother could not visually observe what occurred, but she testified that she did hear Brown and the officers. (*Id.*) Once the bedroom door was open, Deputy Blanchard observed Brown sitting at the computer desk with his back towards the door. (Pet. App. at 39.) Deputy Blanchard ordered Brown to show his hands. (*Id.*) Brown ignored the command and instead turned and briefly glanced at Deputy Blanchard. (*Id.*) Deputy Blanchard again ordered Brown to show his hands; however, Brown again ignored the order. (*Id.*)

Brown then stood up from his chair and turned toward Deputy Blanchard and Deputy Such. (*Id.*) The deputies observed blood on Brown's left arm and that Brown was holding an open five-inch bladed knife pointed downward at his side with his right hand. (*Id.*) Deputy Blanchard and Deputy Such noticed that Brown was looking at them with a "thousand-yard stare." (*Id.*) Brown proceeded to walk toward the deputies, with his knife still pointed downward at his side and he suddenly slammed the bedroom door closed with his left hand. (*Id.*)

Deputy Blanchard immediately kicked the door open a second time. (*Id.*) After kicking the door open, Deputy Blanchard again positioned himself in the narrow hallway, just outside of the bedroom door

frame. (*Id.*) At that point, Deputy Blanchard recalled ordering Brown to drop the knife; however, Brown's mother testified that she did not hear Deputy Blanchard give that command. (Pet. App. at 25.) Brown's mother and Deputy Blanchard agree, however, that Brown said something to the effect of: "Fine, come in and shoot me between the eyes and kill me." (Pet. App. at 40.) However, Brown's mother testified that Brown made that statement before the door was kicked open, while Deputy Blanchard recalled that Brown made the statement after the door was kicked open the second time. (*Id.*)

The deputies were undeniably the only witnesses to observe Brown's physical movements within the bedroom. (Pet. App. at 42.) After the door was kicked open a second time, the deputies both observed Brown standing approximately halfway between his computer desk and the bedroom door. (Pet. App. at 39.) The deputies then both observed Brown begin to advance toward them again. (*Id.*) This time, however, Brown rolled his shoulders forward and started moving the knife in an upward position toward Deputy Blanchard. (*Id.*) With Brown between five and six feet from the deputies, Deputy Blanchard fired two shots, killing Brown. (*Id.*)

2. As the special administrator of the Estate of John Brown, Nancy Brown commenced this 42 U.S.C. § 1983 action alleging that Deputy Blanchard violated the Fourth Amendment through his use of force, that Deputy Such was liable for failure to intervene and that Walworth County was liable pursuant to

Monell v. Department of Social Services, 436 U.S. 658, 690 (1978). After discovery, the defendants filed a motion for summary judgment seeking dismissal of all claims on the merits and dismissal of the individual capacity claims based on qualified immunity. (Pet. App. at 35.) The record on summary judgment contained the deposition testimony of Brown's mother; however, the plaintiff had neither requested nor obtained the depositions of Deputy Blanchard or Deputy Such, so both deputies submitted affidavits in support of summary judgment. (Pet. App. at 42.)

In its published decision, the district court granted summary judgment in part and denied it in part. (Pet. App. at 55.) The district court granted summary judgment in favor of Deputy Such and dismissed the failure to intervene claim. (Pet. App. at 51.) However, the district court denied summary judgment as to Deputy Blanchard and Walworth County. (Pet. App. at 55.)

The district court concluded that Deputy Blanchard could face Fourth Amendment liability on two different theories. First, despite there being no conflicting eye witness accounts of Brown's physical actions and the movement of the knife in the bedroom and no conflicting forensic evidence to dispute the deputies' affidavits, the district court determined that the deputies may not have been honest when they swore upon oath that Brown was advancing toward them with an upraised knife at the time of the shooting:

> An initial question is whether there is a genuine factual dispute over whether the deputies reasonably thought that Brown was advancing on them with an upraised knife. Each deputy has submitted an affidavit stating that Brown was advancing on them in this fashion. *The plaintiff has not submitted any evidence that directly contradicts the deputies' affidavits on this point.* Of course, that is because Brown is dead and cannot relate his version of what happened.
>
> * * *
>
> Here, the plaintiff has specific evidence that calls the deputies' credibility into question – namely, Brown's mother's testimony about what happened in the moments prior to the shooting. *Although Brown's mother cannot testify as to whether Brown actually threatened the deputies with the knife*, the differences between her testimony and the deputies' testimony on other matters, such as whether the deputies told Brown to drop the knife and when Brown told the deputies to shoot him, might cause the jury to question whether the deputies are being truthful about what actually happened during the confrontation.

(Pet. App. at 42-43) (emphasis added).

Second, beyond the district court's finding of a purported dispute of fact related to Brown's physical actions in the bedroom, the district court also concluded that Deputy Blanchard could face independent

Fourth Amendment liability for "unreasonably creating the encounter that led to Brown's threatening the deputies with serious physical harm" by kicking open the bedroom door. (Pet. App. at 44.) The district court reasoned that because "Brown was contemplating suicide, he was unlikely to obey the deputy's commands to surrender." (Pet. App. at 45.) As such, the district court concluded that Deputy Blanchard could have violated the Fourth Amendment for his pre-seizure conduct, even if the shooting of Brown was otherwise lawful under the Fourth Amendment. (Pet. App. at 47.)

On the question of whether Deputy Blanchard should be afforded qualified immunity, the district court summarily concluded that "Blanchard is not entitled to qualified immunity because it is clearly established that an officer may not use deadly force to seize a subject who is not threatening the safety of the officer or anyone else." (Pet. App. at 49 (citing *Tennessee v. Garner*, 471 U.S. 1, 9-12 (1985)). The foregoing was the extent of the district court's qualified immunity analysis on the use of deadly force.

Finally, the district court also analyzed the qualified immunity defense to the Fourth Amendment "pre-seizure conduct theory" and recognized that "no case precisely identified Blanchard's conduct . . . as the kind of 'unreasonable conduct' that creates a dangerous situation." (Pet. App. at 49.) Nonetheless, the court denied Deputy Blanchard qualified immunity on the pre-seizure conduct theory based on the court's conclusion that Deputy Blanchard's

conduct in confronting Brown was obviously unreasonable. (*Id*. (citing *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)).

3. Pursuant to *Mitchell*, 472 U.S. 511, Deputy Blanchard appealed the district court's denial of qualified immunity to the Seventh Circuit. The Seventh Circuit consolidated this case with another appeal argued on the same date that also involved the use of deadly force. *Williams*, 797 F.3d 468. However, the appeals came to the Seventh Circuit in different contexts: while the district court denied Deputy Blanchard's motion for summary judgment based on qualified immunity, the district court in *Williams* had granted the officers' motion for summary judgment by concluding, *inter alia*, that the officers were entitled to qualified immunity. (Pet. App. at 6.)

In Deputy Blanchard's appeal, the Seventh Circuit held that the district court erred in denying qualified immunity on the Fourth Amendment "pre-seizure conduct" theory. (Pet. App. at 27.) The Seventh Circuit noted that its "caselaw is far from clear as to the relevance of pre-seizure conduct, or even as to a determination as to what conduct falls within the designation 'pre-seizure,' although the majority of cases hold that it may not form the basis for a Fourth Amendment claim." (*Id*.) As such, the Seventh Circuit barred a finding of Fourth Amendment liability based solely on Deputy Blanchard's actions leading up to the shooting. (Pet. App. at 28-29.)

Regarding the qualified immunity defense for the shooting itself, the Seventh Circuit repeatedly held that it was powerless to consider the district court's purported genuine issue of material fact on appeal. (Pet. App. at 26, 30-31, 33.) While the Seventh Circuit acknowledged that Brown's mother could not visually observe what occurred, it nonetheless held that it was required to accept the district court's conclusion that the deposition testimony of Brown's mother regarding what she heard the deputies and Brown say created a genuine issue of material fact as to whether Brown raised his knife and advanced on the officers just before the shooting:

> Because this is an interlocutory appeal from the denial of qualified immunity, our review is limited in scope. We may review the purely legal question of whether a given set of undisputed facts demonstrates a violation of clearly established law, but we may not review the record to determine whether the district court erred in finding that a genuine issue of material fact exists. Accordingly, in determining whether the district court properly denied qualified immunity, we accept the district court's determination that there was a genuine issue of fact as to whether [Brown] was raising the knife and advancing toward the deputies at the time he was shot.

(Pet App. at 26 (quotation marks and citations omitted).) The Seventh Circuit held that it was bound by this determination despite the fact that the

district court itself acknowledged that the Respondent "did not submit any evidence that directly contradicts" the sworn affidavits of the deputies. (Pet. App. at 42.)

Based on its perceived limited scope of review, the Seventh Circuit considered only whether Blanchard was entitled to qualified immunity if Brown was merely holding the knife five to six feet away from the deputies at the time that he was shot, as opposed to also advancing on the deputies and raising the knife. (Pet. App. at 30.) The court of appeals concluded that Deputy Blanchard was not entitled to qualified immunity if Brown was merely holding the knife, because it was clearly established that "a person has a right not to be seized through the use of deadly force unless he puts another person (including a police officer) in imminent danger or he is actively resisting arrest and the circumstances warrant that degree of force." (Pet. App. at 31 (citations omitted).) Moreover, despite Brown undeniably being armed with a knife with an exposed five-inch blade in a confined space with the deputies, the Seventh Circuit concluded that Brown was merely passively resistant, thereby barring any significant use of force against him. (Pet. App. at 31-32.)

In support of its ruling that the unlawfulness of Deputy Blanchard's use of deadly force in this case was clearly established, the Seventh Circuit defined clearly established law to generally bar any significant use of force on a non-resisting or passively resisting subject. (Pet. App. at 31.) While the court

cited to a number of cases involving passive resistance, it did not point to any previous authority that involved a subject armed with an open knife and the attendant unique and serious threats posed. *See, e.g.*, *Tennessee v. Garner*, 471 U.S. 1 (1985) (general deadly force standard against a fleeing suspect); *Estate of Starks v. Enyart*, 5 F.3d 230 (7th Cir. 1993) (deadly force against a suspect attempting to flee in an automobile); *Muhammed v. City of Chicago*, 316 F.3d 680 (7th Cir. 2002) (deadly force against a suspect pointing a firearm at an officer); *Marion v. City of Corydon, Indiana*, 559 F.3d 700 (7th Cir. 2009) (deadly force against a suspect in a high-speed pursuit); *Estate of Escobedo v. Bender*, 600 F.3d 770 (7th Cir. 2010) (did not address a Fourth Amendment use of force claim, but instead addressed the use of tear gas and flash-bang grenades); *Phillips v. Community Ins. Corp.*, 678 F.3d 513 (7th Cir. 2012) (use of a baton launcher against an unarmed and non-responsive suspect presumably unconscious in automobile); *Abbott v. Sangamon Cnty. Ill.*, 705 F.3d 706 (7th Cir. 2013) (decided after the Brown shooting, plaintiff was unarmed, and was subject to multiple TASER® deployments after being incapacitated, falling to ground and no longer moving); *Weinmann v. McClone*, 787 F.3d 444 (7th Cir. 2015) (decided after the Brown shooting, plaintiff possessed a gun on his lap, but was not pointing the firearm at an officer or anyone else).

Based on the foregoing authority, the Seventh Circuit concluded that it was clearly established that

Deputy Blanchard's use of deadly force was unlawful in the context of this case if Brown was merely holding his open knife five to six feet away from the deputies. The Seventh Circuit therefore affirmed the district court's denial of summary judgment.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's decision fails to adhere to this Court's guidance on two independent points – an overly broad interpretation of *Johnson* and a failure to properly define the constitutional issue raised in this qualified immunity appeal.

First, the Seventh Circuit interpreted the holding in *Johnson* too broadly by concluding that it was obligated to accept the district court's determination of a genuine issue of material fact, without considering whether the purported factual dispute was contrary to the evidence-supported record, as recognized in *Scott* and *Plumhoff*.

The Seventh Circuit's broad interpretation of *Johnson* and its progeny allows district courts to manipulate rulings denying qualified immunity to artificially shield those rulings from appeal. A court could do this by: (a) finding disputes of fact or drawing factual inferences that are contrary to the evidence-supported record; and then (b) holding those disputes of fact as genuine and material, so as to defeat qualified immunity on summary judgment. The practical implication of this interpretation is that the

qualified immunity defense may become illusory in some judicial districts.

Second, the Seventh Circuit failed to define the constitutional issue raised through this case with particularity. Specifically, the court failed to acknowledge or consider the unique threat posed to an officer by a non-compliant and unstable individual armed with an open knife in close proximity, as opposed to unarmed passive resistors or those armed with firearms that are not pointed towards officers. While a gun must be pointed at an individual to kill or seriously injure the person, the same cannot be said of a knife held in close proximity to an individual. Although this difference between guns and knives is a very important aspect of law enforcement safety, such distinction was not recognized by the Seventh Circuit.

The Seventh Circuit's ruling cripples police officers' ability to protect themselves by effectively prohibiting the use of deadly force against a non-compliant and unstable suspect who is armed with a knife and located within a dangerous proximity, simply because the suspect does not raise the knife and advance even closer to an officer. This restriction on the use of force to protect an officer is even more troubling when the subject is intoxicated, mentally ill, has been acting irrationally, and has unmistakably displayed the propensity to inflict bodily harm by cutting himself. The Seventh Circuit's precedent jeopardizes police officer safety and inhibits law

enforcement's ability to confidently and effectively protect the public and themselves.

A. This Court Should Resolve the Split in the Courts of Appeals on the Proper Scope of Review in Qualified Immunity Appeals.

At multiple points in its ruling, the Seventh Circuit held that it was obligated to accept the district court's determination that there was a genuine issue of material fact regarding whether Mr. Brown was advancing toward Deputy Blanchard with an upraised knife at the moment of the shooting. However, in limiting its review, the Seventh Circuit erred in failing to recognize the proper scope of appellate review in the wake of recent decisions.

1. The Supreme Court's Direction

In *Johnson*, police officers encountered the plaintiff, who unbeknownst to them, was experiencing a diabetic seizure. *Johnson*, 515 U.S. at 307. The officers mistakenly believed that the plaintiff was drunk and therefore arrested him. *Id.* After the plaintiff woke up in a hospital with broken ribs, he sued the officers alleging excessive force. *Id.* Three of the officers moved for summary judgment, arguing that the plaintiff identified no evidence in the record showing that the movants (as opposed to other officers) were the officers responsible for allegedly beating the plaintiff. *Id.* The officers presented the classic "it wasn't me" defense; however, the district court found

a dispute of fact and denied summary judgment. *Id.* at 308.

On appeal, the officers' sole argument was again that they were not the wrongdoers and that the record lacked any evidence showing that they beat the plaintiff or allowed others to do so. *Id.* The Seventh Circuit refused to consider this particular argument on the basis that it lacked jurisdiction to review a dispute of fact. *Id.* This Court accepted review and affirmed. With the *sole* appellate issue being whether the officers were the parties who beat the plaintiff, this Court concluded that there was no jurisdiction to remedy that factual dispute through a qualified immunity appeal. *Id*. at 317-318. However, this Court also acknowledged that, had the appeal in *Johnson* also included a question of law, appellate jurisdiction would exist. *Id*. at 318.

This Court's ruling in *Johnson* was largely tied to the question of whether resolving a pure question of fact would satisfy the separability requirement of the collateral order doctrine set forth in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949) and later contemplated in *Mitchell*. *Johnson*, 515 U.S. 314-315. Particularly, the separability requirement permitted interlocutory appellate jurisdiction if the appeal would resolve an important issue separate from the merits of the action. *Johnson*, 515 U.S. at 310. However, the separability requirement has not been offended in this Court's decisions subsequent to *Johnson* that addressed purported factual disputes

because jurisdiction was established through a proper question of law related to qualified immunity.

In the term that followed *Johnson*, this Court already seemed to limit its jurisdictional restriction. In *Behrens v. Pelletier*, this Court considered whether *Johnson* should be interpreted broadly to bar an interlocutory appeal of a denial of summary judgment based on material issues of fact. *Behrens*, 516 U.S. 299, 312 (1996). This Court rejected the broad interpretation of *Johnson* and limited its reach by holding that *Johnson* "surely does not mean that *every* such denial of summary judgment is nonappealable." *Id.* at 312.

A decade later in *Scott*, this Court again reviewed a district court's denial of qualified immunity based on competing versions of facts in an excessive force case involving a high-speed chase. 550 U.S. at 375. Although lower courts are required to "view the facts and draw reasonable inferences in [favor of the nonmovant]," the Court acknowledged an "added wrinkle" in the case: uncontroverted video footage of the incident in the record. *Id.* at 378-379. The plaintiff argued that his elusive driving did not pose a threat to others; however, the video footage plainly showed otherwise. *Id.* at 379-380. The Court took issue with the plaintiff's contentions and, in language that seemed to limit *Johnson* further, required that appellate courts ensure that proposed disputes of fact on summary judgment be both genuine and material: "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 ruling on a motion for summary judgment." *Id.* at 380.

Similarly, in *Ashcroft v. Iqbal*, the Court again considered these policies when reviewing a district court's denial of a motion to dismiss on qualified immunity. 556 U.S. 662, 667-670 (2009). This Court ruled that these concerns "that animated the decision in *Johnson*" were absent in *Iqbal*. "[R]esort to a 'vast pretrial record' . . . was unnecessary," and, thus, inquiry into whether the plaintiff's complaint sufficiently stated a claim that could survive qualified immunity would not "replicate inefficiently questions that will arise on appeal following final judgment." *Id.* at 674.

Almost a decade after *Scott* and *Iqbal*, the Court in *Plumhoff* again reviewed a district court's denial of qualified immunity based on a dispute of fact. *Plumhoff* involved an excessive force claim against an officer who pursued a suspect in a high-speed chase. 134 S. Ct. at 2018-2019. This Court reviewed the facts on summary judgment, rejected the district court's findings of disputed facts, and analyzed the legal questions relating to the Fourth Amendment and qualified immunity. *Id.* at 2021-2022. The Court held that the record conclusively disproved respondent's claim that the chase had concluded by the time that officers began shooting. *Id.*

Just last term, the Court also subtly suggested in a footnote that it may be willing to review the factual record: "We need not decide whether there is a genuine dispute of fact here because the officers' other, independent concerns make this point immaterial." *City and County of San Francisco v. Sheehan*, 575 U.S. ___, 135 S. Ct. 1765, 1770 n.1 (2015). While this Court has not explicitly overruled *Johnson*, even before *Plumhoff* and *Sheehan*, legal scholars have recognized that the Court's interpretation of *Johnson* seems to be growing narrower: "Unlike [*Scott*], which implicitly blurred *Johnson*'s distinction between fact and law, *Iqbal* expressly authorized interlocutory appellate courts to delve into the facts alleged in constitutional complaints." Mark R. Brown, *Qualified Immunity and Interlocutory Fact-Finding in the Courts of Appeals*, 114:4 Penn. St. L. Rev. 1317, 1318 (2010).

2. The Inconsistent Application of *Johnson* and its Progeny by the Courts of Appeals

Within the courts of appeals, the foregoing issue has been addressed perhaps most thoroughly by Judge Jeffrey Sutton in *Romo*:

> Keeping in mind that courts do not read judicial opinions like statutes, I submit that there are two ways to read *Johnson*. One applies it only to prototypical "he said, she said" fact disputes, in which the defendants (usually government employees) refuse to

> accept the truth of what the plaintiffs (usually individual claimants) say happened. When the appeal boils down to dueling accounts of what happened and when the defendants insist on acknowledging on appeal only their accounts, the underlying basis for an interlocutory appeal disappears.
>
> The other applies the decision not just to whether the defendant officers accept the plaintiff's evidence-supported version of what happened but also to whether the defendants accept the *district court's* reading of the *inferences* from those facts. . . . Under that view (and the majority's view), when a district court determines that there is a "genuine issue of fact" for trial by drawing an inference in favor of the plaintiff, the appellate court may not second-guess that inference, indeed lacks jurisdiction to do so. I favor the former reading.

Romo, 723 F.3d at 678 (Sutton, J., concurring) (emphasis in original). At least one appellate judge has gone a step further than Judge Sutton by concluding that *Johnson* may be a "dead letter in light of *Scott v. Harris*." *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1119 n.1 (10th Cir. 2008) (O'Brien, J., dissenting).

Other circuits have applied this more narrow interpretation of *Johnson*, based in part on this Court's ruling in *Scott*, *Iqbal* and *Plumhoff*. *See Blaylock v. City of Philadelphia*, 504 F.3d 405, 414 (3d Cir. 2007) (*Scott* marks "the outer limit of the principle of *Johnson v. Jones* – where the trial court's

determination that a fact is subject to reasonable dispute is blatantly and demonstrably false, a court of appeals may say so, even on interlocutory review"); *Moldowan v. City of Warren*, 578 F.3d 351, 370 (6th Cir. 2009) ("In trying to reconcile *Scott* with the Supreme Court's edict in *Johnson*, this [c]ourt has concluded that where 'the trial court's determination that a fact is subject to reasonable dispute is blatantly and demonstrably false, a court of appeals may say so, even on interlocutory appeal.'"); *Lewis v. Tripp*, 604 F.3d 1221, 1225-1226 (10th Cir. 2010) ("[W]hen the 'version of events' the district court holds a reasonable jury could credit 'is blatantly contradicted by the record,' we may assess the case based on our own de novo view of which facts a reasonable jury could accept as true."); *Witt v. W. Va. State Police, Troop 2*, 633 F.3d 272, 277 (4th Cir. 2011) (*Scott* "reinforces the unremarkable principle that at the summary judgment stage, facts must be viewed in a light most favorable to the nonmoving party when there is a *genuine* dispute as to those facts."); *Wallingford v. Olson*, 592 F.3d 888, 892 (8th Cir. 2010) ("Although we view the facts and any reasonable inferences in the light most favorable to [the plaintiff], we cannot ignore evidence which clearly contradicts [the plaintiff's] allegations."); *Morton v. Kirkwood*, 707 F.3d 1276, 1284-1285 (11th Cir. 2013) (recognizing that a circuit court may "discard[ ] a party's account when the account is inherently incredible and could not support reasonable inferences sufficient to create an issue of fact").

However, even with the benefit of the guidance in *Scott*, *Iqbal* and *Plumhoff*, other circuits continue to apply the broad interpretation of *Johnson* that was utilized by the Seventh Circuit in this case. *See*, *e.g.*, *Kindl v. City of Berkley*, 798 F.3d 391, 401 (6th Cir. 2015) (dismissing qualified immunity appeal by not "anticipating *Johnson*'s overruling."); *New v. Denver*, 787 F.3d 895, 903 (8th Cir. 2015) ("I am sympathetic to the court's desire to reach the merits. . . . Our lack of jurisdiction subjects Denver to continued suit based on what seems like scant evidence." (Gruender, J., dissenting)); *George v. Morris*, 736 F.3d 829, 834 (9th Cir. 2013) ("Any decision by the district court that the parties' evidence presents genuine issues of material fact is categorically unreviewable on interlocutory appeal."); *Culosi v. Bulock*, 596 F.3d 195, 201 (4th Cir. 2010) ("Whether we agree or disagree with the district court's assessment of the record evidence . . . is of no moment in the context of this interlocutory appeal."); *Fogarty v. Gallegos*, 523 F.3d 1147, 1154 (10th Cir. 2008) ("[W]e are not at liberty to review a district court's factual conclusions, such as the existence of a genuine issue of material fact for a jury to decide, or that a plaintiff's evidence is sufficient to support a particular factual inference.").

3. The Seventh Circuit's Application of *Johnson* and its Progeny

The appellate posture of this case embodies Judge Sutton's disfavored application of *Johnson*. Unlike *Johnson*, Deputy Blanchard's defense does not

rest on a purely factual claim that he was not the officer to use force. Instead, the question of law is whether the district court properly determined that Brown might not have been advancing with an upraised knife through its reliance on unrelated, immaterial factual disputes.

There are only two evidence-supported factual disputes in this case: (1) *when* Mr. Brown undeniably stated something like "fine, come in and shoot me between the eyes," and (2) whether Deputy Blanchard ordered Mr. Brown to drop the knife as he claimed but Brown's mother did not hear. Considering the context of what transpired during this incident, these subtle discrepancies should not be surprising. *See Sigman v. Town of Chapel Hill*, 161 F.3d 782, 787 (4th Cir. 1998) (quoting *Gooden v. Howard Co.*, 954 F.2d 960, 965 (4th Cir. 1992) (en banc)) ("it will nearly always be the case that witnesses differ over what occurred. That inevitable confusion, however, need not signify a difference of triable fact.").

Deputy Blanchard has accepted Ms. Brown's evidence-supported version of the timing of Brown's statement encouraging the deputies to shoot him and the contention that Deputy Blanchard did not give an order for Brown to drop the knife. In that the district court did not rely directly on those two facts in its decision, it seemed to have acknowledged that the foregoing evidence-supported facts alone, without more, were insufficient to overcome Deputy Blanchard's qualified immunity defense. Instead, the district court parlayed those otherwise immaterial

factual disputes into an entirely new purported dispute that was contradicted by the evidence-supported record, which the Seventh Circuit felt obligated to accept.

The district court, based on the minor differences in recollection of what was said and when, held that, in the moment immediately before the shooting, Mr. Brown may not have been advancing on Deputy Blanchard with an upraised knife. The combination of the district court's unsupported factual determination with the Seventh Circuit's interpretation of *Johnson* and its progeny, seemingly produced an order denying qualified immunity that could not be effectively reviewed on appeal.

The proper interpretation of *Johnson* is of paramount importance to the qualified immunity defense, particularly in Fourth Amendment cases involving law enforcement. Officers are afforded the qualified immunity defense; however, given the interweaving of fact and law common in Fourth Amendment claims, it is entirely possible that immunity may be lost as a practical matter without oversight of material factual findings by appellate courts.

B. The Seventh Circuit Did Not Define the Constitutional Question in a Particularized Sense and Erred in Denying Qualified Immunity.

Regardless of whether the Seventh Circuit should have reviewed the dispute of fact identified by the

district court, certiorari should be granted to review the denial of qualified immunity. If the district court's determination that a factual dispute exists is subject to appellate review and if it is recognized that Mr. Brown was indeed advancing towards Deputy Blanchard with an upraised knife at the time of the shooting, the constitutional review would likely be anticlimactic. However, even if the district court's factual dispute must be accepted, and Mr. Brown was merely holding the open knife five to six feet from Deputy Blanchard, the alleged unlawfulness of the use of deadly force in this context was not clearly established, beyond debate. Additionally, the Seventh Circuit should have found that Deputy Blanchard's use of deadly force was reasonable as a matter of law.

1. The Use of Deadly Force in this Case Did Not Violate Clearly Established Law.

Just last term, this Court reiterated that:

> An officer "cannot be said to have violated a clearly established right unless the right's contours were *sufficiently definite that any reasonable official in [his] shoes would have understood that he was violating it*," meaning that "existing precedent . . . placed the statutory or constitutional question *beyond debate*. . . ." We have repeatedly told courts . . . *not to define clearly established law at a high level of generality*.

Sheehan, 135 S. Ct. at 1175-1177 (emphasis added).

In this case, the Seventh Circuit erred by only considering the general constitutional standard governing the use of deadly force, without regard for the particular scenario that Deputy Blanchard faced. Instead of defining the constitutional question in a particularized sense, the court rejected qualified immunity by relying on the general standard for the use of deadly force as outlined in *Garner*. However, this Court has previously held that the "use of *Garner*'s 'general' test for excessive force was 'mistaken.'" *Mullenix v. Luna*, 577 U.S. ___, 136 S. Ct. 305, 309 (2015) (quoting *Brosseau v. Haugen*, 543 U.S. 196, 199 (2004)).

Beyond *Garner*, the Seventh Circuit cited to other court of appeals decisions, some of which were issued after the Brown shooting. The court relied perhaps most substantially on its holding in *Weinmann*, 787 F.3d 444. However, the *Weinmann* decision was issued on May 27, 2015 – problematically, more than three years after the Brown shooting. *See Brosseau*, 543 U.S. at 198 ("Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct.").

Moreover, even if court of appeals decisions could clearly establish constitutional law, those decisions fall well short of establishing a "robust consensus" addressing the use of deadly force in the context of the scene that Deputy Blanchard faced. *Sheehan*, 135 S. Ct. at 1778; *Carroll v. Carman*, 574 U.S. ___, 135 S. Ct. 348, 350 (2014); *Reichle v. Howards*, 566 U.S.

___, 132 S. Ct. 2088, 2094 (2012). For example, the Seventh Circuit relied on two cases involving suspects fleeing in an automobile. *See Estate of Starks v. Enyart*, 5 F.3d 230 (7th Cir. 1993) (deadly force against a suspect attempting to flee in an automobile); *Marion v. City of Corydon, Indiana*, 559 F.3d 700 (7th Cir. 2009) (deadly force against a suspect in a high-speed pursuit). Just as it is improper to deny qualified immunity in a police chase case through the use of non-chase precedent, so too the Seventh Circuit erred in denying Deputy Blanchard qualified immunity by relying on cases that involved threats posed to officers by suspects fleeing in automobiles as opposed to unstable subjects armed with knives in close proximity. *See*, *e.g.*, *Scott*, 550 U.S. at 383 ("*Garner* had nothing to do with one car striking another or even with car chases in general. . . . A police car's bumping a fleeing car is, in fact, not much like a policeman's shooting a gun so as to hit a person." (quoting *Adams v. St. Lucie County Sheriff's Dept.*, 962 F.2d 1563, 1577 (11th Cir. 1992) (Edmondson, J., dissenting), adopted by 998 F.2d 923 (11th Cir. 1993) (en banc) (per curiam))).

Similar to what the Court noted in *Mullenix*, the cases relied on by the Seventh Circuit "are simply too factually distinct to speak clearly to the specific circumstances here." *Mullenix*, 136 S. Ct. at 312. More specifically, the court of appeals failed to acknowledge the distinct threat that officers face when confronted by suspects armed with a knife, as opposed to a firearm. Simply put, at close range, *a*

knife is potentially more deadly than a firearm. Although a firearm's bullets only travel in the direction pointed, a knife can be used with different hand configurations, can cut and stab from any direction or angle, and can be thrown at an officer. For example, the record establishes that Deputy Blanchard was trained on the existence of a 21-foot zone-of-danger when confronting a subject armed with a knife and courts have recognized that officers are trained that an individual can throw a knife and kill an officer from within 21 feet before an officer has the opportunity to react to protect himself. This is referred to as the "reactionary gap." *Estate of Larsen ex rel. Sturdivant v. Murr*, 511 F.3d 1255, 1261 n.1 (10th Cir. 2008) (police training "instructs that knife-wielding persons within 21 feet pose an 'imminent threat' to officers based on the time in which the distance can be closed in an attack").

Given these facts, the Seventh Circuit erred in relying on deadly force cases involving suspects pointing firearms at themselves, or towards no one, is misplaced. Deputy Blanchard was on notice that he could not shoot a suspect who is only pointing a firearm at himself; however, he was not on notice that it would be unlawful to use deadly force against an intoxicated and unpredictable suspect armed with a knife who is standing in close proximity. Neither this Court nor the Seventh Circuit has addressed those particular dangerous circumstances.

Further, it was also not clearly established that Brown's behavior amounted to mere "passive resistance," which, by definition, may be insufficient to give rise to a threat of imminent danger. Although the Seventh Circuit concluded that it was clearly established that substantial force could not be used against a suspect who is passively resisting, the court again failed to identify any legal authority clearly establishing that Brown's conduct while armed with an open knife amounted to mere passive resistance. Besides the Seventh Circuit's decision in this case, the Petitioner has been unable to locate any published opinions describing a suspect as "passively resisting" when he is armed, intoxicated and emotionally unstable while displaying his weapon in close proximity to an officer. In fact, it appears that the opposite may hold true. *U.S. v. Mattarolo*, 209 F.3d 1153, 1158 (9th Cir. 2000) (the possibility of "a surprise attack at close quarters with even a small knife presents danger sufficient to justify an officer in taking reasonable protective measures"); *Long v. Slaton*, 508 F.3d 576, 581-582 (11th Cir. 2007) ("the law does not require officers in a tense and dangerous situation to wait until the moment a suspect uses a deadly weapon to act to stop the suspect"); *Reynolds v. Cnty. of San Diego*, 858 F. Supp. 1064, 1072 (S.D. Cal. 1994) ("Courts cannot ask an officer to hold fire in order to ascertain whether the suspect will, in fact, injure or murder the officer.").

Finally, both the district court and the Seventh Circuit failed to acknowledge or distinguish *Easley v.*

Kirmsee, 235 F. Supp. 2d 945 (E.D. Wis. 2002) – a factually analogous published decision from the same judicial district and involving the same county that Deputy Blanchard serves as a deputy sheriff. When considering whether a particular right is clearly established, this Court has emphasized the importance of what a reasonable officer understands to be the law:

> To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right. In other words, existing precedent must have placed the statutory or constitutional question beyond debate. This clearly established standard protects the balance between vindication of constitutional rights and government officials' effective performance of their duties by ensuring that officials can reasonably anticipate when their conduct may give rise to liability for damages.

Reichle, 132 S. Ct. at 2093 (punctuation, citations and internal quotation marks omitted).

For purposes of overcoming the qualified immunity defense, a district court decision is insufficient to clearly establish a right. *See al-Kidd*, 131 S. Ct. at 2084 ("a district judge's *ipse dixit* of a holding is not 'controlling authority' in any jurisdiction. . . ."). Nonetheless, a published decision from within the local judicial district does serve to identify what a reasonable officer would understand the law to be. *Id*. at

2086 (Kennedy, J., concurring) ("Some federal officers perform their function in a single jurisdiction, say within the confines of one State or one federal judicial district. They 'reasonably can anticipate when their conduct may give rise to liability for damages' and so are expected to adjust their behavior in accordance with local precedent.").

In *Easley*, which also involved a Walworth County officer, the Eastern District of Wisconsin granted summary judgment on the merits, without need to reach the qualified immunity arguments, in a case that also involved an intoxicated subject who was also holding a knife, and who had also already cut himself before officers arrived. *Easley*, 235 F. Supp. 2d at 965.

The plaintiff in *Easley* was shot outdoors while standing *15 feet* from the officers. *Id.* at 951. In its decision, the local district court accepted the fact that the "distance requirement to react to an edged weapon is within a 21' barrier" and held that Mr. Easley posed an imminent threat of death or great bodily harm to the officers by the time he came within 15 feet. *Id. Easley* is significant because it referred to the 21-foot safety barrier relative to subjects who are armed with knives and informed officers – at least those who serve in Southeastern Wisconsin – that deadly force is not unlawful when an intoxicated and unpredictable suspect is holding a knife two to three times further away from the officer than Mr. Brown was.

Regardless of whether Brown was advancing with an upraised knife or if he was simply holding his open knife in close proximity to the deputies at the time of the shooting, an officer in Deputy Blanchard's position could not have been on notice that the use of deadly force was unlawful in light of the fact that the non-compliant and unpredictable Mr. Brown was only five to six feet away from Deputy Blanchard at the time of the shooting. The Seventh Circuit's improper reliance on precedent that did not involve the unique threat from a non-compliant and unpredictable subject armed with a knife has significant implications for law enforcement practices, warranting review by this Court.

2. The Seventh Circuit also Erred in Denying Qualified Immunity by Finding the Use of Force was not Reasonable as a Matter of Law.

As addressed above, regardless of whether the district court's factual determination was subject to appellate review, Deputy Blanchard did not violate clearly established law. Moreover, the Seventh Circuit should have granted qualified immunity by finding that the use of deadly force was reasonable as a matter of law, thereby rendering the "clearly established" component of the qualified immunity defense moot.

For a use of force to be legally justified pursuant to the Fourth Amendment as a matter of law, the use of force must be objectively reasonable under the

totality of the circumstances. *Plumhoff*, 134 S. Ct. at 2020 (citing *Graham v. Connor*, 490 U.S. 386 (1989); *Garner*, 471 U.S. 1). The determination of whether or not deadly force is lawful depends in relevant part on "whether the suspect poses an immediate threat to the safety of the officers." *Graham*, 490 U.S. at 396. Where an officer has probable cause to believe that a suspect poses a significant threat of death or serious physical injury to the officer or others, the officer may use deadly force. *Garner*, 471 U.S. at 8-9.

"The particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. "The calculus of reasonableness 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." *Graham,* 490 U.S. at 396-397 (internal quotation marks and citations omitted). This reality is reflected in the fact that courts give considerable leeway to law enforcement officers' assessments about the appropriate use of force in dangerous situations. *Baird v. Renbarger*, 576 F.3d 340, 342 (7th Cir. 2009). "[T]he Fourth Amendment does not require omniscience. . . . Officers need not be absolutely sure . . . of the nature of the threat or the suspect's intent to cause them harm – the Constitution does not require that certitude precede the act of self-protection." *Anderson v. Russell*, 247 F.3d 125, 132 (4th Cir. 2001) (citations omitted).

Considering the totality of the circumstances confronted by Deputy Blanchard, the use of deadly force against Brown was objectively reasonable as a matter of law. While it is not possible to know for certain what Brown's intentions were, he had already used his knife to harm himself and his close proximity meant that he could have used the knife to kill or serious harm the deputies more rapidly than the deputies could have reacted to protect themselves. It is undisputed that Brown was only five to six feet away from Deputy Blanchard when the deputy used deadly force. The foregoing constituted an "immediate threat to the safety of the officers" such that deadly force did not offend the Fourth Amendment. *Graham*, 490 U.S. at 396.

Deputy Blanchard was forced to make a split-second decision in an extremely tense, uncertain and rapidly evolving situation. Under the totality of the circumstances, no jury could conclude that his use of deadly force was unreasonable. Deputy Blanchard used deadly force against Brown because he believed that Mr. Brown's actions placed him and Deputy Such in imminent danger of death or serious bodily harm. Deputy Blanchard's belief in this regard was objectively reasonable when considering the totality of the circumstances in this case. Accordingly, the Seventh Circuit erred in not finding the use of deadly force lawful as a matter of law.

CONCLUSION

Based on the foregoing, the Petitioner respectfully requests the Court grant his Petition.

Respectfully submitted,

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December 21, 2015

Counsel for Petitioner

In the
United States Court of Appeals
for the Seventh Circuit

No. 14-2523

Estate of
William E. Williams, *et al*.,

Plaintiffs-Appellants,

v.

Indiana State Police
Department, *et al.,*

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Indiana, Terre Haute Division.
No. 2:12-cv-00324-JMS-DKL –
Jane E. Magnus-Stinson, *Judge.*

Nos. 14-2523 & 14-2808

No. 14-2808

Nancy Brown,

Plaintiff-Appellee,

v.

Wayne Blanchard and
Walworth County, Wisconsin,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 2:13-cv-00511-LA – **Lynn Adelman,** *Judge.*

BOTH ARGUED JANUARY 20, 2015
BOTH DECIDED AUGUST 13, 2015

Before RIPPLE and ROVNER, *Circuit Judges*, and KENNELLY, *District Judge*.*

ROVNER, *Circuit Judge.* We have consolidated for decision these two appeals, heard on the same day, that present similar issues of law relating to the reasonableness of force under the Fourth Amendment. In both cases, family members called police officers to their home because a family member had locked himself in a room of his home and was threatening suicide. The officers responded to the distress call, but in both cases the situation tragically ended with the person's death as a result of shots fired by the officers. Although we will discuss the facts in more detail later, the basic circumstances were as follows. In the case on behalf of the estate of Williams, the police officers were faced with a person, William E. Williams, who had locked himself in a bathroom, had taken all the Xanax left in a prescription bottle, and had cut

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* The Honorable Matthew F. Kennelly, United States District Court for the Northern District of Illinois, sitting by designation.

himself and complained that it was taking longer than expected for him to bleed out. The officers had no good vantage point to see him in the second floor bathroom, and he repeatedly threatened to kill anyone who attempted to come into the bathroom. The officers unlocked the bathroom door and fired tasers at Williams, but those tasers had no effect. When Williams pursued the officers with a knife, the officers shot and killed him. In the case brought by Nancy Brown, John Brown had also cut himself, and was locked in his bedroom although his mother had a key and had come in and spoken with him. Officers could see him through the bedroom window. Shortly after arriving, an officer at the scene decided to kick the bedroom door in, and ultimately he fatally shot John Brown who also possessed a knife. On behalf of the deceased person, the plaintiffs in each case brought suit against the officers pursuant to 42 U.S.C. § 1983, alleging that the officers used excessive force in violation of the Fourth Amendment when they effected the seizure.

I.

Because the Fourth Amendment explicitly addresses the sort of physically intrusive government conduct that constitutes a seizure, that amendment rather than generalized notions of substantive due process guides such claims. *Graham v. Connor*, 490 U.S. 386, 395 (1989). In determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment, we must balance the

nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interest alleged to justify the intrusion. *Id.* at 396; *Fitzgerald v. Santoro*, 707 F.3d 725, 733 (7th Cir. 2013); *Abbott v. Sangamon County, Illinois*, 705 F.3d 706, 724 (7th Cir. 2013). Such an analysis is inherently fact-dependent, requiring consideration of such factors as the severity of the crime at issue, whether the person posed an immediate threat to the safety of the officers or others, and whether the person was actively resisting the officers. *Graham*, 490 U.S. at 396; *Miller v. Gonzalez*, 761 F.3d 822, 829 (7th Cir. 2014); *Abbott*, 705 F.3d at 724. In assessing such a claim, however, we must remain cognizant of the incredibly difficult task facing law enforcement officers called to address fluid situations such as those presented in these cases. Accordingly, the reasonableness of an officer's actions must be assessed from the perspective of a reasonable officer on the scene, not based on the "20/20 vision of hindsight." *Graham*, 490 U.S. at 396; *Fitzgerald*, 707 F.3d at 733; *City and County of San Francisco, California v. Sheehan,* ___ U.S. ___, 135 S. Ct. 1765, 1775 (2015). That assessment must include a recognition that officers are often forced to make split second judgments in tense, uncertain, and rapidly evolving situations, as to the amount of force necessary in a particular situation. *Graham*, 490 U.S. at 396-97; *Abbott*, 705 F.3d at 724; *Sheehan*, 135 S. Ct. at 1775. We thus give considerable leeway to law enforcement officers' assessments regarding the degree of force appropriate in dangerous situations. *Abbott*, 705 F.3d

at 724-25. Throughout the analysis, the reasonableness inquiry is an objective one, which examines whether the officer's actions are objectively reasonable in light of the totality of the facts and circumstances confronting him or her, without regard for consideration of the officer's subjective intent or motivations. *Graham*, 490 U.S. at 397; *Miller*, 761 F.3d at 828-29; *Fitzgerald*, 707 F.3d at 733. An officer's use of force is unreasonable if in light of all those circumstances at the time of the seizure, the officer used greater force than was reasonably necessary to effectuate the seizure. *Id.* "The Supreme Court further has counseled that it is reasonable for a law enforcement officer to use deadly force if an objectively reasonable officer in the same circumstances would conclude that the suspect posed a threat of death or serious physical injury to the officer or to others." *Marion v. City of Corydon, Indiana*, 559 F.3d 700, 705 (7th Cir. 2009), citing *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985).

If we determine that the use of force was excessive under that constitutional standard, we must turn to the next question, which is whether the officers are entitled to qualified immunity for their actions. "Qualified immunity, in effect, affords enhanced deference to officers' on-scene judgments about the level of necessary force . . . because, even if the plaintiffs demonstrate that excessive force was used, they must further establish that it was objectively unreasonable for the officer to believe that the force was lawful – i.e., they must demonstrate that the right to be free

from the particular use of force under the relevant circumstances was 'clearly established.'" *Abbott*, 705 F.3d at 725. For qualified immunity purposes, a right is clearly established if the contours of that right are sufficiently clear that a reasonable officer would understand that his actions violate that right – "[i]n other words, 'existing precedent must have placed the . . . constitutional questions beyond debate.'" *Id.*, quoting *Reichle v. Howards,* ___ U.S. ___, 132 S. Ct. 2088, 2093 (2012); *Sheehan*, 135 S. Ct. at 1774.

In both cases before us today, the district court was presented with a motion for summary judgment. In *Williams*, the court granted summary judgment in favor of the officer defendants, concluding that the officers were entitled to qualified immunity. The plaintiffs now appeal that determination. In contrast, the district court in *Brown* denied summary judgment to the officers on the constitutional claim as well as on the issue of qualified immunity. The defendants appealed that denial to this court. *See Weinmann v. McClone*, 787 F.3d 444, 447 (7th Cir. 2015) (discussing the appealability of denials of qualified immunity).

The Supreme Court recently addressed a Fourth Amendment challenge in circumstances analogous to the ones presented here in *Sheehan*, 135 S. Ct. 1765, and its analysis is instructive. Teresa Sheehan resided in a group home for persons dealing with mental illness. *Id.* at 1769. Sheehan's mental condition appeared to be deteriorating to the extent that she had stopped taking her medications, no longer spoke

with her psychiatrist, and reportedly had stopped changing her clothes or eating. *Id.* When the social worker used a key to enter Sheehan's room, Sheehan yelled at the social worker to get out and shouted that she had a knife and would kill the social worker if necessary. *Id.* at 1769-70. Police officers were then called to the group home. The officers knocked on Sheehan's door, announced who they were, and indicated that they wanted to help Sheehan. *Id.* at 1770. When Sheehan failed to respond, the officers entered the room using a key, and again Sheehan responded in a violent manner. Sheehan grabbed a knife and began approaching the officers, yelling that she was going to kill them, that she did not need help, and that they should get out. *Id.* The officers left the room, but determined that immediate action was required, and chose not to wait for the backup that was already on the way. *Id.* at 1771. One officer then pushed the door open while the other began using pepper spray on Sheehan. *Id.* Sheehan did not drop the knife, however, and when Sheehan was within a few feet of the officers, one of the officers shot her twice. *Id.* When she failed to collapse, the other officer fired multiple shots at her. *Id.* Sheehan survived the incident, and ultimately brought a § 1983 challenge alleging that the officers violated her Fourth Amendment right against unreasonable seizures.

The Ninth Circuit held that although the initial entry into the room was lawful, and the firing of the shots was reasonable when the pepper spray failed to stop Sheehan's advance, a jury could find that the

officers provoked Sheehan by needlessly forcing that second confrontation. *Id.* at 1772. The majority also denied the claim of qualified immunity, holding that "it was clearly established that an officer cannot 'forcibly enter the home of an armed, mentally ill subject who had been acting irrationally and had threatened anyone who entered when there was no objective need for immediate entry.'" *Id.*, quoting *Sheehan v. City and County of San Francisco*, 743 F.3d 1211, 1229 (9th Cir. 2014).

The Court reversed the Ninth Circuit on the qualified immunity issue. The Court agreed that the officers did not violate any federal right when they opened Sheehan's door the first time, because "'[l]aw enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.'" *Id.* at 1774-75, quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). Moreover, the Court recognized that the second entry was also constitutionally permissible because it was part of a continuous search or seizure, and the officers knew that Sheehan had a weapon and had threatened to use it to kill three people, and that delay could make the situation more dangerous. *Id.* at 1775. Under the reasonableness standard of the Fourth Amendment, the Court held that it was reasonable for police to move quickly "if delay 'would gravely endanger their lives or the lives of others,'" even if the actions proved with the benefit of hindsight to be a mistake. *Id.*, quoting *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294,

298-99 (1967). The Court noted that the Constitution is not blind to the need for officers to make split second judgments. *Id.* The Court further agreed that upon opening the door the second time, the officers' use of force was reasonable – from the initial use of pepper spray to the escalation to deadly force in an effort to protect themselves. According to the Court, the "real question" in the case was whether the Fourth Amendment was violated when the officers opened the door for the second time rather than attempting to accommodate her disability. In other words, the Court considered whether the knowledge of her disability impacted the reasonableness of the officers' actions. Because the briefing focused on this issue in the context of whether the officers had qualified immunity, the Court proceeded directly to the question of whether the officers' failure to accommodate Sheehan's illness violated clearly established law.

The Court held that the cases relied upon by the Ninth Circuit panel majority were insufficient to constitute the type of clearly established law that would jettison qualified immunity. For instance, the Court stated that the Ninth Circuit's reliance on *Graham v. Connor*, 90 U.S. 386 (1989), was misplaced because *Graham* established only that the objective reasonableness test applies to excessive force claims and that was "far too general a proposition to control this case." *Sheehan*, 135 S. Ct. at 1775. The Court emphasized that it had repeatedly told courts not to define clearly established law at a high level of generality. "Qualified immunity is no immunity at all if 'clearly

established' law can simply be defined as a right to be free from unreasonable searches and seizures." *Id.* at 1776. In comparing the facts of the cases relied upon by the Ninth Circuit panel majority, the Court determined that the facts were too dissimilar to control the case. Moreover, the Court noted that a Fourth Amendment violation could not be established by merely demonstrating that bad tactics resulted in a deadly confrontation that could have been avoided. *Id.* at 1777. Nor did it matter, for qualified immunity purposes, that an expert testified that the officers failed to follow their training as to how to handle mentally ill persons in such scenarios. *Id.* "Rather, so long as 'a reasonable officer could have believed that his conduct was justified,' a plaintiff cannot '[a]void summary judgment by simply producing an expert's report that an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless.'" *Id.,* quoting *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002). The Court noted that even if the Ninth Circuit panel majority had properly concluded that its cases would have put officers on notice that it was unreasonable to forcibly enter the home of an armed, threatening, mentally ill suspect absent an objective need for immediate entry, qualified immunity was proper because no precedent clearly established that there was no objective need for immediate entry here. *Id.* at 1777. Because the officers had no fair and clear warning of what the Constitution required in the situation that they faced on that day, qualified immunity applied. *Id.* at 1778. *Sheehan* thus cautions against interpreting the

"clearly established law" requirement too broadly and substituting general propositions of law for cases that are factually similar enough to apprise the officers of the contours of the constitutional protections due in the situation. We turn then, to the application of *Sheehan* and the other cases set forth above, to the facts of the individual cases before us, largely drawing from the thorough presentation of facts set forth in the comprehensive district court decisions.

II.

On the evening of January 15, 2012, William (Bill) Williams sent a text message to his sons Tyler and Jacob which caused them to fear that he was going to commit suicide. Both sons proceeded to the home. When Jacob arrived at the home, he broke down the locked bedroom door, and discovered that his father had locked himself into the bathroom adjoining the bedroom. His father threatened to kill Jacob if he came into the bathroom. Jacob informed the 911 dispatcher that his father was probably going to shoot himself and that his father threatened to stab him if he opened the bathroom door. In the meantime, Williams' sister and her boyfriend arrived at the home. In response to the 911 contact, Putnam County deputy sheriff John Chadd, Cloverdale police officer Charles Hallam, and Indiana State Police officer Brian Thomas arrived at the scene. Those responders were later joined by officers Patrick Labhart and Chris Springstun of the Indiana Department of Natural Resources. For the sake of brevity, we will

refer to all of the law enforcement responders collectively as "officers" in this opinion whether deputy sheriffs or officers and regardless of agency. The dispatcher informed Chadd and Hallam that Williams may have cut his wrists. Chadd asked the dispatcher to contact the Putnam County Sheriff's Department negotiator, but the dispatcher was unable to reach the negotiator.

At some point around that time, Chadd and Labhart used a stepladder outside the home in an attempt to see inside the window of the bathroom. The appellants vehemently dispute the officers' claim that they could see blood in the bathroom from the vantage point on the ladder, but that dispute is immaterial in this case because there is no dispute that Williams in fact had cut himself in an attempt to commit suicide and that the officers were aware of that fact. The appellants argue that the extent of Williams' injuries is material because the officers testified that the amount of blood factored into their decision to subsequently unlock the bathroom door and confront Williams. The subjective motivation of the officers, however is irrelevant because the assessment as to the reasonableness of the force used in a seizure is an objective test. As we noted above, courts consider only whether the officers' actions are objectively reasonable in light of the totality of the facts and circumstances confronting them, regardless of the officers' subjective motivations. *Graham*, 490 U.S. at 397; *Miller*, 761 F.3d at 828-29. As will be discussed later, the undisputed evidence established

that Williams had engaged in behavior that endangered his life and necessitated action by the officers, and therefore we need not consider whether additional evidence in the form of visual observation of blood in the bathroom was also undisputed.

While some of the officers were attempting to see into the bathroom, Hallam spoke with Williams from within the bedroom. Hallam asked Williams what was going on, to which Williams responded "Who the f– are you?" After Hallam identified himself as a Cloverdale police officer and asked Williams how he was doing, Williams responded "Get the f– out of here. Get the f– out of my house. Leave me alone." Williams threatened to stab Hallam or anyone else who opened the door.

The appellants dispute that Hallam spoke with Williams and thus contest whether Williams was ever aware that officers were in the house, arguing that it is relevant to whether the subsequent actions were objectively reasonable. The district court, however, properly resolved this issue, and we agree with its reasoning. Hallam testified that he spoke with Williams alone, but appellants rely on the testimony of four officers that they did not hear Hallam communicate with Williams. That does not contradict Hallam's testimony, and in fact is consistent with his testimony that he was alone when he communicated with Williams. Moreover, three officers testified that Hallam informed them at the time that he had spoken with Williams. The appellants did not present evidence disputing that testimony, such as evidence

that Hallam was never alone in the bedroom and thus could not have had that conversation. The only other evidence relied upon by the appellants are subsequent conversations the officers had with Tyler, who arrived at the home after the time at which Hallam had the conversation with Williams. At that time, other officers were present in the bedroom and they informed Tyler to keep his voice down because Williams did not know they were there, and cautioned him to not let his father know that any law enforcement was present. That conversation does not contradict Hallam's testimony that he had a prior conversation with Williams, and in fact their desire to keep Williams in the dark as to their presence in the room is consistent with the testimony that Williams became agitated when Hallam identified himself as an officer and demanded that Hallam leave the house. In short, the appellants have presented no evidence to dispute that Hallam spoke with Williams. The officers' instruction not to alert Williams that they were gathering outside the bathroom does not support an inference that Hallam therefore did not communicate with Williams earlier in the ordeal. Mere speculation is insufficient to raise a genuine issue of fact.

It is undisputed that in the officers' presence, Tyler spoke with Williams through the bathroom door. In that conversation, Williams told Tyler that he had knives and an injecting needle used to marinate turkeys. He further stated that he had taken the rest of his bottle of Xanax and that he had cut himself, but

that it had "taken longer than planned," and was not "going as fast as the internet said," but that he needed 30 more minutes and he would be done. He also asked Tyler to get him a gun.

Chadd told Tyler to let Williams believe that he had a gun in an attempt to lure him out, and even placed his own gun on the floor outside the door so Williams could see it when Williams demanded evidence of the gun. Williams still could not see the gun, however, and refused to open the door.

The officers had discussed with Williams' mother how to open the locked bathroom door from the outside, and she had provided them with a Q-Tip with the top removed, which could be used to "pop" the lock on the door. After the attempt to lure Williams out with the gun failed, the officers decided to unlock the door in that manner at which time Chadd and Hallam would tase Williams and then handcuff him. The testimony is contradictory as to whether the plan was to open the door and tase him only if he failed to come out voluntarily, or to immediately tase him without warning. When the officers unlocked and opened the door, Williams was standing at the sink facing the mirror, with two knives sitting on the sink by his hands – each knife measuring approximately a foot long. Williams turned towards the doorway, and Chadd and Hallam fired their tasers at him (either simultaneously or in short succession). The tasers unfortunately had no effect on Williams, who exited the bathroom towards Chadd and Hallam while raising a knife above his head. Chadd and Hallam backed

away from Williams, who turned toward Hallam and continued to follow him as Hallam backed up and moved around the bed. When Hallam rounded the final corner of the bed, he fired at Williams but missed, and subsequently fired a second shot that hit Williams. Hallam then continued backing up until he fell on the bed. Williams fell on top of Hallam and his knife cut one of Hallam's fingers. When there was a brief separation of Hallam and Williams, other officers fired at Williams as well, and he was fatally struck. Approximately 2-4 seconds elapsed from when Williams exited the bathroom to when he was shot, and around 29 minutes from when the officers first arrived at the home to the tragic culmination of events.

The appellants maintain that the use of force against a subject who is not actively resisting violates clearly established law and the officers accordingly are not entitled to qualified immunity. They argue that the district court failed to view the facts in the light most favorable to Williams, and if the court had properly considered the evidence it would have determined that Williams was not actively resisting. We have already discussed the appellants' arguments relating to the officers' ability to see into the bathroom window, and as to whether there is a dispute of fact that Hallam spoke with Williams. The appellants additionally argue that the district court improperly weighed evidence when it considered Williams' threats to kill anyone who entered the bathroom and determined that those statements established probable

cause to believe Williams had committed felony intimidation. The appellants assert that threatening statements cannot be criminal unless the speaker intended to communicate a "true threat," and that there is a dispute as to whether Williams intended to harm anyone because family members testified that they did not believe Williams intended to harm anyone. As an initial matter, we note that the repeated explicit threats by Williams, coupled with his possession of a weapon and his refusal to cooperate or exit the bathroom, provided an objective basis for the officers to believe that he posed a threat to the safety of himself and others. The family members' subjective interpretations do not alter that, and here the family members' actions do not even support that characterization of their subjective state of mind. Although the family members entered into the locked bedroom, and had the ability to unlock the bathroom with a Q-Tip in their possession, none of the family members did so after speaking with Williams and being told that he would kill anyone who entered. Their actions are consistent with a concern that he could harm himself or others, not with a belief that his threats were merely idle ones.

The *Sheehan* decision discussed above addressed a similar situation. In the present case, as the Court held in *Sheehan*, the officers were entitled to enter Williams' room "to render emergency assistance to [the] injured occupant or to protect [the] occupant from imminent injury." *Sheehan*, 135 S. Ct. at 1774-75 (internal quotations marks omitted). Specifically,

it is undisputed that the officers were aware that Williams had cut himself in an attempt to commit suicide and that he told his son Tyler, in the officers' presence, that he had taken a large quantity of Xanac [sic] in an effort to harm or kill himself that was "tak[ing] longer than planned." Under the rule as announced in *Sheehan*, it is of no consequence for purposes of the Fourth Amendment that Williams' injury and imminent injury were self-inflicted; the officers were not required to allow him to carry out his suicide attempt. When the officers entered Williams' room, they initially attempted to take control of him without using deadly force. As we discuss later, their initial use of the tasers was appropriate under constitutional standards given Williams' possession of a knife and his threat to stab anyone who entered. When that was unsuccessful, and Williams advanced on them brandishing the knife, the officers acted reasonably in using deadly force; plaintiffs do not argue otherwise.

That brings us to the appellants' related argument, which is that a reasonable officer, upon opening the bathroom door, would have been able to see that Williams was not at risk of bleeding out and therefore there were no exigent circumstances necessitating action. Once again, the Supreme Court and this court have repeatedly rejected that type of second-guessing of the split second decisions officers are forced to make in confronting rapidly evolving situations. *Id.* at 1775. Williams had acknowledged that he had cut himself and that it was taking longer than he thought

to lose sufficient blood to end his life, and had also admitted to taking all of the remaining Xanax pills in his possession in an attempt to end his life. He also threatened to kill anyone who entered. Faced with those undisputed facts, as a matter of law the officers possessed an objectively reasonable belief that action was needed to avoid the threat to his life and the potential threat to others inherent in the danger that he could emerge in that agitated state with the knives. The appellants argue that no exigency was present because Williams had not lost consciousness and "it is generally well known that most suicide attempts are not successful, unless a gun is used," and in support point to the testimony of a forensic pathologist that only 20-50% of suicide attempts are successful. This rather astounding argument is unavailing. Setting aside the obvious question that perhaps non-firearms suicide attempts are unsuccessful precisely because timely aid is rendered, the argument would alter the standard to one that would allow officers to act only in the event of imminent death. There is no support for such a standard that would prohibit officers from rendering aid to a person who has already harmed himself, or that would require them to wait until a hostile person emerged and attacked others before attempting to defuse the situation, and it is inconsistent with *Sheehan.*

Finally, no clearly established law renders the officers' use of force unreasonable in light of the circumstances that they faced. Williams' presence in

the confined space of a bathroom, inaccessible from the outside, presented the officers with limited options, which was further impacted by the space limits of the bedroom that adjoined it. The decision to employ tasers immediately upon opening the bathroom door was a reasonable use of force to subdue a person who potentially presented an immediate threat to himself and the officers once that door was opened. Under the qualified immunity standard, the appellants must demonstrate that "the right to be free from the particular use of force under the relevant circumstances was 'clearly established.'" *Abbott*, 705 F.3d at 725. Rather than establishing that such force was impermissible, our cases repeatedly have upheld the use of non-lethal force such as tasers in such situations. We have described tasers as "falling somewhere in the middle of the nonlethal-force spectrum." *Id.* at 726. Although describing it as more than a *de minimis* application of force and recognizing the pain that it can cause, "we have also acknowledged that the use of a taser, like the use of pepper spray or pain-compliance techniques, generally does not constitute as much force as so-called impact weapons, such as baton launchers and beanbag projectiles." *Id.* We have upheld its use in a situation in which a person was refusing to move from a doorway and an officer believed that fellow officers in the blocked room needed assistance, *Clarett v. Roberts*, 657 F.3d 664, 674-75 (7th Cir. 2011), and where a defendant "displayed an unwillingness to accede to reasonable police commands, and his actions suggested an intent to use violence to fend off further police action,"

United States v. Norris, 640 F.3d 295, 303 (7th Cir. 2011). *Abbott*, 705 F.3d at 727-28.

In contrast, the appellants have failed to present any case that would establish that the use of a taser in a scenario such as this one is excessive. Their arguments rest essentially on the characterization of Williams' actions as passive rather than active resistance without any real sense of urgency or threat to others, which is premised on the speculative notion that his threats were idle ones. Moreover, their assertion that the officers should have been able to ascertain once the door was open that Williams was not in immediate danger of death and did not pose a threat is unavailing for multiple reasons. First, he was standing at the sink with two large knives on the sink next to his hands, and turned toward the door as it opened. That is not evidence that he had abandoned his threat to kill those who tried to enter. Moreover, courts have repeatedly rejected any attempt to hold officers to such an impossible standard of altering their conduct based on the split-second unfolding of events. For instance, in *Johnson v. Scott*, 576 F.3d 658, 660 (7th Cir. 2009), we held that an officer did not act unreasonably in striking a shooting suspect several times until the suspect was handcuffed, despite evidence that immediately prior to that the shooting suspect had turned and offered to surrender when cornered in a residential yard. We held that the suspect was not known to be subdued when the pursuers applied force. We have since noted that "[t]he critical fact in *Johnson* was that the officer

'had no idea how Johnson was going to behave once he was cornered.'" *Miller*, 761 F.3d at 830, quoting *Johnson*, 576 F.3d at 660. The officers in this case similarly could not know how Williams would react to the opening of the door, other than Williams' own words that he would try to kill them, and their decision to employ non-lethal force to avoid that danger was reasonable. The appellants here, like the plaintiffs in *Sheehan*, cannot point to any case involving a dangerous, obviously unstable person in possession of a weapon, making threats, which would have put the officers on notice that their conduct was constitutionally impermissible. Accordingly, the officers were entitled to qualified immunity for their decision to open the door and utilize the tasers.

Once the tasers were employed without effect, the officers were presented with a person advancing towards them with a knife, and in fact one officer was ultimately stabbed by Williams. The appellants do not contest that the officers acted reasonably in firing the shots at that point. Accordingly, the district court properly held that the officers were entitled to qualified immunity.

III.

We turn then to the facts in *Brown*. Late in the evening on May 4, 2012, John Brown, who was 22 years old, left voice and text messages with friends indicating that he was contemplating suicide. One of those friends contacted his mother, Nancy Brown,

who resided in the mobile home with John, and informed her that John was in his bedroom and that he was hurting himself. Nancy immediately went to check on John, and after unlocking his bedroom door with a key, found him sitting at his computer desk, crying and holding a folding knife. He was bleeding from his wrist. Nancy rushed over to John and tried to take the knife from him, but he refused to let go of it. She then held his head in her arms and told him she was going to get help. John locked the door again when Nancy exited the bedroom to call 911.

Nancy informed the dispatcher that her son was attempting to commit suicide and had a knife. She further stated that there were no other weapons in the bedroom, that John was bipolar and refused to take his medication, and that he had been drinking heavily and had cut himself in the past.

Deputy Christopher Such was the first to arrive at the mobile home. He spoke with Nancy, and then proceeded down the hallway to the bedroom door. Such identified himself to John through the closed door. Loud music could be heard in the bedroom, and John did not initially respond. Such then prompted John by asking if John remembered Such from a prior encounter in which Such has given John a ride to a nearby city. According to Such's affidavit, John responded "f– you," but Nancy maintains that he did not so respond.

Shortly thereafter, at 12:14 a.m., Deputy Wayne Blanchard arrived at the scene. The sequence of

events that followed his arrival transpired quickly, because by 12:16 a.m, two minutes after Blanchard's arrival, Blanchard had shot and killed John. The facts as to what transpired in that time are in dispute. Blanchard in his affidavit states that he spoke with Nancy who conveyed the same information to him as she had to Such, and then Such briefed him on his communication through the door with John. Blanchard removed his gun from the holster and proceeded to the bedroom door, while Such went outside and looked through John's window. Such radioed to Blanchard that John was sitting at his computer desk drinking a beer and smoking a cigarette, with his back to the bedroom door. Declining Nancy's offer of a key to unlock the bedroom door, Blanchard determined that he would instead kick in the bedroom door so that John would not have time to access any other weapons (although Nancy stated that she had informed the dispatcher that no other weapons were in the bedroom, and the dispatcher relayed all information to the deputies). Nancy proceeded back down the hallway and sat down on a sofa in the living room, from which she could hear but could not see the subsequent events.

According to Blanchard, he then kicked down the bedroom door and then took a step back to position himself. Such then ran back into the mobile home and positioned himself behind Blanchard, drawing his taser in the process. They observed John sitting at the computer desk as described by Such in the radio communication. Blanchard ordered John to show his

hands, but John briefly glanced at Blanchard and ignored the order. Blanchard repeated the order and John again ignored it. John then stood up, and the affidavit statements of Such and Blanchard are jarringly similar in the description of John. They both stated that John turned toward them in a "Frankenstein-like" manner. They observed blood on John's left arm, and he was holding a folding knife in his hand. John gave them a "thousand-yard stare," walked to the bedroom door and slammed it closed. Blanchard immediately kicked the door in a second time, pointed the gun at John who was halfway between the door frame and his desk, and ordered John to drop the knife. John told Blanchard that Blanchard would have to shoot him, and then, according to both deputies in yet another similar description, John "rolled his shoulders forward," started moving the knife "in an upward position" and began advancing towards Blanchard. When John was within 5 or 6 feet of Blanchard, Blanchard fired two shots at him resulting in his death.

Nancy heard the exchange from her position in the living room, and her statement differs from those of the deputies in critical ways. Specifically, she stated that she did not hear Blanchard tell John to drop the knife, but before she heard Blanchard kick in the door, she heard one of the deputies call John's name twice. She then heard John say "fine, come in and shoot me between the eyes and kill me." She then heard the door being kicked, slammed shut, and kicked in a second time, followed directly by two

gunshots. Under her version, therefore, after the door was kicked in the second time, John was never ordered to drop his knife and did not state that they would have to kill him. The district court held that Nancy's testimony created a genuine issue of fact as to whether John was in fact threatening the officers with a knife at the time he was shot. The court held that Nancy could not see whether John raised his knife, but her testimony as to what she heard cast doubt on the veracity of the deputies' version of events, and thus it was a question for the jury. Because this is an interlocutory appeal from the denial of qualified immunity, our review is limited in scope. We may review the purely legal question of whether "a given set of undisputed facts demonstrates a violation of clearly established law," but we may not review the record " 'to determine whether the district court erred in finding that a genuine issue of material fact exists.' " *Gutierrez v. Kermon*, 722 F.3d 1003, 1009 (7th Cir. 2013), quoting *Via v. LaGrand*, 469 F.3d 618, 624 (7th Cir. 2006); *Leaf v. Shelnutt*, 400 F.3d 1070, 1078 (7th Cir. 2005). Accordingly, in determining whether the district court properly denied qualified immunity, we accept the district court's determination that there was a genuine issue of fact as to whether John was raising the knife and advancing toward the deputies at the time he was shot.

In denying the motion for summary judgment based on qualified immunity, the district court identified two factual scenarios under which, in its view, a jury could find that Blanchard unreasonably had

seized John. The first theory of liability considered by the district court is that Blanchard unreasonably created an encounter that led to the use of force against John. According to the district court, Blanchard could be liable under that theory even if he established that he reasonably thought John was advancing on him with an upraised knife, if the jury found that Blanchard's actions in kicking in the door were not reasonably calculated to prevent John from harming himself, which was the only legitimate ground for initiating a seizure.

Blanchard argues that the district court erred in denying qualified immunity on that ground, because it was not clearly established that pre-seizure conduct of a law enforcement officer can violate the Fourth Amendment's prohibition of unreasonable seizures. Blanchard is entitled to qualified immunity unless existing precedent placed the constitutional question beyond debate. *Abbott*, 705 F.3d at 725. That standard is not met here. Our caselaw is far from clear as to the relevance of pre-seizure conduct, or even as to a determination as to what conduct falls within the designation "pre-seizure," although the majority of cases hold that it may not form the basis for a Fourth Amendment claim. *Compare Marion*, 559 F.3d at 705 ("Pre-seizure police conduct cannot serve as a basis for liability under the Fourth Amendment; we limit our analysis to force used when a seizure occurs."), *and McCoy v. Harrison*, 341 F.3d 600, 605 (7th Cir. 2003) ("Even unreasonable, unjustified, or outrageous conduct by an officer is not prohibited by the Fourth

Amendment if it does not involve a seizure." (alteration omitted) (internal quotation marks omitted)), *and Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992) ("[P]re-seizure conduct is not subject to Fourth Amendment scrutiny."), *with Sledd v. Lindsay*, 102 F.3d 282, 288 (7th Cir. 1996) (noting that if an officer fails to identify himself the normal rules governing the use of deadly force are modified, and discussing the Sixth Circuit's determination that an officer violates the Fourth Amendment if he "unreasonably create[s an] encounter that [leads] to a use of force" by "entering a private residence late at night with no indication of identity"), *and Estate of Starks v. Enyart*, 5 F.3d 230, 234 (7th Cir. 1993) (holding that an officer violates the Fourth Amendment if he "unreasonably create[s an] encounter" in which an individual would be "unable to react in order to avoid presenting a deadly threat to [the officer]"); *see also* Aaron Kimber, Note, *Righteous Shooting, Unreasonable Seizure? The Relevance of an Officer's Pre-Seizure Conduct in an Excessive Force Claim*, 13 Wm. & Mary Bill Rts. J. 651, 673 (2004) ("The Seventh Circuit has been inconsistent in how it allows pre-seizure conduct to be utilized by a plaintiff."). The district court acknowledged that "no case precisely identifies Blanchard's conduct as the kind of 'unreasonable conduct' that creates a dangerous situation," but concluded that it nevertheless would have been obvious to a reasonable officer in Blanchard's position. Dist. Ct. Decision and Order at 12 (July 17, 2014). Given the lack of clarity in cases in this area, we disagree that Blanchard was on notice that his conduct leading

up to the encounter could itself be the basis for Fourth Amendment liability. *See Sheehan*, 135 S. Ct. at 1775-76 (cautioning against defining clearly established law at a high level of generality).

That does not mean that Blanchard's pre-seizure conduct is irrelevant to the Fourth Amendment claim. The sequence of events leading up to the seizure is relevant because the reasonableness of the seizure is evaluated in light of the totality of the circumstances. *Deering v. Reich*, 183 F.3d 645, 649-52 (7th Cir. 1999). For instance, the short period of time that elapsed from Blanchard's arrival to the confrontation, and his abrupt action in kicking in the door, give context to John's possession of the knife that might be different if John had himself opened the door holding the knife. The circumstances known by Blanchard, or even created by him, inform the determination as to whether the lethal response was an objectively reasonable one. *Id.* But our caselaw does not clearly establish that an officer may be liable under the Fourth Amendment solely for his pre-seizure conduct that led to the encounter. *See Graham*, 490 U.S. at 395 (claim of excessive force in the course of a seizure should be analyzed under the Fourth Amendment reasonableness standard rather than under the substantive due process approach); *Carter*, 973 F.2d at 1332 ("[t]he Fourth Amendment prohibits unreasonable seizures, not unreasonable, unjustified or outrageous conduct in general.")

The second theory of liability considered by the district court concerns whether Blanchard is entitled

to qualified immunity for using deadly force in the absence of probable cause to believe that John was threatening him at the time. Under this theory of liability, the issue is whether it is clearly established law that Blanchard could not constitutionally use lethal force against John in the circumstances facing Blanchard. On appeal, Blanchard argues both that the record establishes that he had probable cause to believe that John was raising the knife and advancing, and that even absent that John's possession of the knife in those circumstances were sufficiently threatening that he was entitled to qualified immunity. As we stated above, the first argument impermissibly seeks a review of the district court's determination that there is a genuine issue of fact as to whether John was advancing with the knife. Accordingly, we review only whether Blanchard is entitled to qualified immunity regardless of whether John was merely holding the knife or advancing with it.

In contrast to the situation presented in *Williams*, in this case, Blanchard resorted to the use of lethal force as an initial matter, and he did so despite the possession of a taser by Such who was present at the scene. There may have been reasons for that choice, given the confined nature of the mobile home including a hallway that was only 2-½ feet wide thus limiting mobility, but the record is undeveloped as to that. We must balance the nature of the force used – from lethal through the spectrum of non-lethal options such as flash bang devices, bean bags, pepper spray

and tasers – with the governmental interest at stake. Even focusing the reasonableness inquiry, as Blanchard urges, on only the shooting itself as opposed to the second breach of the door that preceded it, the district court properly denied qualified immunity.

It is well-established – and has been since long before the shooting at issue here – that "a person has a right not to be seized through the use of deadly force unless he puts another person (including a police officer) in imminent danger or he is actively resisting arrest and the circumstances warrant that degree of force." *Weinmann*, 787 F.3d at 448; *Marion*, 559 F.3d at 705; *Muhammed v. City of Chicago*, 316 F.3d 680, 683 (7th Cir. 2002); *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985). Accordingly, we have repeatedly recognized that officers could not use significant force on nonresisting or passively resisting suspects. *Abbott*, 705 F.3d at 732; *Estate of Starks*, 5 F.3d at 233. If Nancy's description is accurate, and we must credit her version at this stage because the district court determined that it created a genuine issue of fact, then deadly force was used here even though John was merely passively resisting their entreaties, and in the absence of any threats of violence by John toward the deputies or anyone else. *See Phillips v. Community Ins. Corp.*, 678 F.3d 513, 525 (7th Cir. 2012) and *Estate of Escobedo v. Bender*, 600 F.3d 770, 780-81 (7th Cir. 2010) (discussing conduct constituting merely passive resistance). In fact, Nancy had entered the room and engaged in physical contact

with John, and at no point did he threaten violence towards her nor did she express any concern with such a possibility to the deputies. Moreover, Such was able to see John through the outside window, and could observe his behavior. At that time, there was no indication that John posed a threat to others, and the extent to which he posed a threat to himself is not established by this record, given that he was observed sitting, smoking a cigarette, drinking a beer, walking and talking and not in apparent immediate danger.

We addressed a strikingly similar factual scenario recently in *Weinmann*, 787 F.3d 444. In that case, Susan Weinmann called 911 to report that her husband, Jerome Weinmann, was in the garage threatening to kill himself and had access to a gun. *Id.* at 446. Within three minutes of arriving, the responding officer Deputy Patrick J. McClone decided to kick in the garage door to make an unannounced entry. *Id.* Although acknowledging that McClone never pointed the shotgun at him, McClone argued that it was undisputed that he perceived the weapon as being pointed in his direction, and he shot Jerome four times. *Id.* at 447. We held that McClone was not entitled to qualified immunity because the facts did not suggest that Jerome had put another person in imminent danger or was actively resisting arrest in circumstances warranting such force. *Id.* at 448-49. McClone knew only that Jerome had access to a firearm, was potentially suicidal, had not responded to the attempt to speak with him, and that sounds from inside the garage resembled pattering

on cupboard doors. *Id.* at 449. We deemed those facts insufficient to suggest anything more than Jerome placing himself in imminent danger. *Id.* We also rejected the argument that the force was justified because of the danger inherent in entering an enclosed garage with a single entrance. *Id.*

The analysis is the same here. Under this theory of liability, Blanchard was faced with facts indicating that John posed a potential threat to himself, but there were no facts indicating that he was a threat to others, and in fact his mother's testimony that she was able to enter the room, talk with him, and hold his head indicates otherwise. Blanchard does not even dispute that proposition. Instead, he argues once again that the undisputed testimony established that John was shot because he approached the officers with a knife in a threatening manner. Blanchard fails to acknowledge that the district court determined that there was a genuine dispute of fact as to that matter, and that we cannot review that determination in this interlocutory appeal. That dispute of fact casts doubt on the contention that immediately after the door was kicked in a second time, John voiced resistance and then walked toward Blanchard with the knife, and as in *Weinmann* the mere possession of the knife is insufficient to warrant summary judgment. We are aware that officers responding to a scene in which a suicidal person is locked in a room are faced with the difficult determination as to whether delay in responding will allow the person to further harm himself or to become aggressive toward

others. It is clearly established, however, that officers cannot resort as an initial matter to lethal force on a person who is merely passively resisting and has not presented any threat of harm to others. Blanchard is not entitled to qualified immunity under that theory of liability, and thus the district court properly denied the motion for summary judgment.

Accordingly, the decisions of the district courts in *Williams* and *Brown* are AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

NANCY BROWN, individually and as Special Administrator for the Estate of JOHN BROWN, Deceased, **Plaintiff,** **v.** **WAYNE BLANCHARD, CHRISTOPHER SUCH, and WALWORTH COUNTY, WISCONSIN** **Defendants.**	**Case No. 13-C-0511**

DECISION AND ORDER

(Filed Jul. 17, 2014)

Nancy Brown, on behalf of the estate of her son, John Brown, seeks relief under 42 U.S.C. § 1983 against Walworth County, Wisconsin, and two of its deputy sheriffs. Before me now is the defendants' motion for summary judgment.

I. BACKGROUND

Late in the evening of May 4, 2012, John Brown, who was 22 years old, locked himself in the bedroom of the mobile home he shared with his mother, Nancy. He was intoxicated and contemplating suicide. He left phone messages for friends in which he stated, among

other things, that he would be looking down from heaven soon and that he "just wanted it to be done." He also sent text messages to friends that indicated he was contemplating suicide. He informed one of his friends, Mindy Hamm, that he had been cutting himself, that there was blood everywhere, and that he was "ending it tonight."

At around midnight, Hamm called Brown's mother and told her that Brown was in his bedroom and that he was hurting himself. Brown's mother was in another part of the mobile home, and she immediately hung up the phone and rushed to Brown's bedroom. The door to Brown's bedroom was locked, but Brown's mother had a key and unlocked the door. When Brown's mother unlocked the door, she saw Brown sitting at his computer desk. She noticed that he was crying, that he was holding a knife, and that he was bleeding from his wrist. She rushed over to Brown and attempted to take the knife out of his hand. When she asked Brown to let go of the knife, he refused. Brown's mother held his head in her arms and told him she was going for help. When she stated that she was going to call the police, Brown said "okay Mom." When Brown's mother left the room to call 911, Brown closed the door and locked it again.

Brown's mother called 911 and told the dispatcher that her 22-year-old son was cutting his wrists with a knife and trying to commit suicide. She told the dispatcher that Brown had cut himself in the past, that he was bipolar, and that he refused to take his medication. She also informed the dispatcher that

Brown had been drinking heavily and that there were no other weapons in the room besides the knife. The dispatcher told Brown's mother that the police were on their way.

Deputies Wayne Blanchard and Christopher Such separately responded to the 911 call. While en route, the dispatcher informed them that an intoxicated male subject had locked himself in his bedroom and was cutting himself with a knife. The dispatcher also informed them that Brown was suicidal, that he was bipolar but refused to take medication, and that Brown's mother had stated that there were no weapons in the room besides the knife.

Deputy Such was the first to arrive at the mobile home. He entered and spoke with Brown's mother, who told him that Brown had locked himself in the bedroom and was cutting himself with a knife. The bedroom was located at the end of a hallway that was 2.6 feet wide. Such walked down the hallway and stood next to the closed door. He could hear loud music playing from Brown's room. He identified himself to Brown through the closed door. At first, Brown did not respond. Such then asked Brown if he remembered him from a prior encounter in which Such had given him a ride to a nearby city. According to Such, Brown responded by saying "fuck you." According to Brown's mother, Brown did not respond in this manner.

Deputy Blanchard arrived a few minutes after Such. Blanchard spoke with Brown's mother, who told

him what she had told Such. Blanchard then spoke with Such, who informed Blanchard that he had tried to speak with Brown through the closed door but that Brown had responded in a negative manner. Brown's mother asked the deputies to help her son.

Blanchard removed his gun from his holster and walked to the bedroom door. Around this time, Such went outside and looked through Brown's bedroom window. Such radioed to Blanchard that he could see into Brown's room, that Brown was sitting at a computer desk with his back towards the bedroom door, that he was conscious, and that he was smoking a cigarette and drinking a beer.

Brown's mother approached Blanchard and gave him a key to the bedroom door. Blanchard gave the key back to her, stating that he intended to kick the door in. According to Blanchard, he decided to kick the door in rather than use a key because he did not want to alert Brown that he was attempting to open the door. Blanchard was concerned that if Brown learned that Blanchard was opening the door, Brown might attempt to access other weapons that may have been in the room. After trying to give Blanchard the key, Brown's mother walked back to the living room and sat down on the sofa.

The deputies and Brown's mother disagree on what happened after this point. According to the deputies, Blanchard kicked the bedroom door open and took a step back to position himself in the hallway. When Such saw through the bedroom window that

the bedroom door was open, he ran back into the mobile home and positioned himself behind Blanchard. The deputies observed Brown sitting at his computer desk with his back to them. Blanchard ordered Brown to show his hands. Brown ignored the order and briefly glanced at Blanchard. Blanchard again ordered Brown to show his hands, and again Brown ignored the order. Brown then stood up and turned toward the deputies in what they describe as a "Frankenstein-like" manner. The deputies observed blood on Brown's left arm and that he was holding a folding knife with what appeared to be a five-inch blade in his right hand. Brown proceeded to give the deputies what they describe as a "thousand-yard stare." Before Blanchard could say anything else, Brown walked to the bedroom door and slammed it closed with his left hand.

Blanchard immediately kicked the door back open. At that point, Blanchard was still in the hallway, just outside the doorframe, and Such was directly behind him. Brown was standing in his bedroom, halfway between the doorframe and the desk. Blanchard pointed his gun at Brown and ordered him to drop the knife. Brown stared at Blanchard and then told Blanchard he would have to shoot him. Brown then "rolled his shoulders forward," started moving the knife "in an upward position" towards Blanchard, and started advancing toward Blanchard. When Brown came within five or six feet of the deputies, Blanchard fired two shots at Brown. Brown was shot in the neck and killed.

Brown's mother tells a slightly different version of the events immediately prior to the shooting. Although she could not see everything that was happening from her position on the couch, she could hear what was happening. She did not hear Blanchard order Brown to drop the knife, but she did hear one of the deputies call his name twice. She heard Brown say something like "fine, come in and shoot me between the eyes and kill me," but according to her Brown said this before Blanchard kicked open the door, in response to Blanchard's informing Brown that he intended to kick the door in. Brown's mother then heard the door being kicked in, slammed again, kicked in a second time, and then she heard the two gunshots.

In the present lawsuit, Brown's mother claims that Deputy Blanchard's actions, which resulted in her son's death, constituted an unreasonable seizure in violation of the Fourth Amendment. She also claims that Deputy Such failed to intervene to prevent Blanchard from shooting Brown. Finally, she claims that Walworth County is liable for Brown's injuries because it failed to train its deputy sheriffs on how to respond to suicide calls. The defendants move for summary judgment on all three of these claims.

II. DISCUSSION

Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the

movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When considering a motion for summary judgment, I take the evidence in the light most favorable to the non-moving party and may grant the motion only if no reasonable juror could find for that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 255 (1986).

A. Claim for Unreasonable Seizure Against Blanchard

The Fourth Amendment protects persons against unreasonable searches and seizures. All claims that law enforcement officers have used excessive force in the course of an arrest, investigatory stop or other "seizure" of a citizen who is not in custody are analyzed under the Fourth Amendment and its "reasonableness" standard. *Graham v. Connor*, 490 U.S. 386, 395 (1989). Whether a particular seizure is reasonable depends upon the totality of the circumstances. *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985). In the present case, Blanchard contends that his seizing Brown by shooting him was reasonable because, at the time Blanchard fired the shots, he reasonably believed that Brown was advancing on him and Deputy Such with the knife and intended to cause serious physical harm. *See id.* at 11 (stating that it is reasonable to use deadly force during a seizure if the officer has probable cause to believe that the person being seized poses a threat of serious physical harm, either to the officer or to others).

An initial question is whether there is a genuine factual dispute over whether the deputies reasonably thought that Brown was advancing on them with an upraised knife. Each deputy has submitted an affidavit stating that Brown was advancing on them in this fashion. The plaintiff has not submitted any evidence that directly contradicts the deputies' affidavits on this point. Of course, that is because Brown is dead and cannot relate his version of what happened. However, Brown's mother was in the next room and could hear what was going on at the time of the shooting. Although she could not see whether Brown raised his knife and advanced on the deputies and therefore cannot directly contradict the deputies' affidavits on this point, her testimony provides reasons to question the deputies' version of what happened. First, although the deputies claim that Blanchard ordered Brown to drop the knife, Brown's mother never heard them give such an order. Second, Brown's mother's testimony conflicts with the deputies' claim that after Blanchard kicked in the door the second time Brown gave him a "thousand-yard stare" and said "you're going to have to fucking shoot me." According to Brown's mother, Brown did say "fine, come in and shoot me," but he said this in response to Blanchard's informing Brown that he was going to kick in the door the first time. Moreover, Brown's mother states that she heard the shots immediately after she heard the door being kicked in a second time, *see* Brown Dep. at 49, ECF No. 25-1, and thus a jury could reasonably question whether enough time passed to allow Brown to give Blanchard a thousand-yard stare,

tell him he would have to shoot him, and then advance on the deputies.

In general, a non-movant cannot avoid summary judgment by claiming that the finder of fact could disbelieve the testimony of the movant's witnesses. *Muhammed v. City of Chicago*, 316 F.3d 680, 683-84 (7th Cir. 2002). However, when the non-movant points to "specific evidence" that can be used to attack the credibility of the movant's witnesses, "such as contradictory eyewitness accounts or other impeachment evidence," a dispute over credibility can defeat summary judgment. *Id.* Here, the plaintiff has specific evidence that calls the deputies' credibility into question – namely, Brown's mother's testimony about what happened in the moments prior to the shooting. Although Brown's mother cannot testify as to whether Brown actually threatened the deputies with the knife, the differences between her testimony and the deputies' testimony on other matters, such as whether the deputies told Brown to drop the knife and when Brown told the deputies to shoot him, might cause the jury to question whether the deputies are being truthful about what actually happened during the confrontation. If the jury decides that the deputies are not being truthful about certain matters concerning the shooting, they may choose to disbelieve other parts of their testimony about what happened during the shooting, including their claim that Brown advanced on them with an upraised knife. *See United States v. Edwards*, 581 F.3d 604, 612 (7th Cir. 2009) (trier of fact may consider whether falsehoods

in witness's testimony so undermine his credibility as to warrant disbelieving the rest of his testimony or a crucial part of such testimony). Thus, whether Blanchard reasonably perceived that Brown was threatening the deputies' safety by raising the knife and advancing on them is a question for the jury to resolve.

However, even if Blanchard establishes that he reasonably thought Brown was advancing on the deputies with an upraised knife, a question would remain as to whether Blanchard unreasonably seized Brown. In assessing whether a police shooting is reasonable, the totality of the circumstances is not "limited to the precise moment when [the officer] discharged his weapon." *Deering v. Reich*, 183 F.3d 645, 649 (7th Cir.1999). Rather, a court must assess "all of the events that occurred around the time of the shooting." *Id.* at 652. The actions of the police officer that led to the shooting are relevant. *Estate of Starks v. Enyart*, 5 F.3d 230, 233-34 (7th Cir.1993). An officer who shoots a suspect in an effort to protect himself cannot escape liability if the danger he faced was created by his own unreasonable conduct. *Id.* at 234; *accord Catlin v. City of Wheaton*, 574 F.3d 361, 369 n.7 (7th Cir. 2009); *Sledd v. Lindsay*, 102 F.3d 282, 287-88 (7th Cir. 1996); *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1366 (9th Cir. 1994); *see also Allen v. Muskogee*, 119 F.3d 837, 840 (10th Cir. 1997) (holding that officer is liable for excessive force if his or her own "reckless or deliberate conduct during the seizure unreasonably created the need to

use such force"); *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995) (same).

Here, a reasonable jury could conclude that Blanchard "unreasonably created the encounter that led to the use of force." *Sledd*, 102 F.3d at 288. Blanchard knew that Brown was suicidal and bipolar, that he had been drinking, and that he had a knife. He also knew that, if left alone, Brown could not have harmed anyone other than himself, as Brown was the only person in the bedroom. Thus, Blanchard's only legitimate ground for initiating a seizure of Brown was to prevent him from harming himself. Yet, it is hard to see how Blanchard's actions – kicking in the door, ordering Brown to show his hands and drop the knife, and pointing his gun at Brown – were reasonably calculated to achieve this end. Since Brown was contemplating suicide, he was unlikely to obey the deputy's commands to surrender. Moreover, a reasonable officer would have known that there is a high likelihood that a suicidal person will respond to an officer's show of force with an action that is likely to provoke the officer to use deadly force, as the person may wish to commit "suicide by cop." *See* Wis. DOJ Law Enforcement Standards Board, *Crisis Management: A Training Guide for Law Enforcement Officers* 66 (2007); ECF No. 29-1 (hereinafter "Crisis Management Guidelines").[1] In light of these risks,

[1] The Crisis Management Guidelines state with respect to armed subjects contemplating suicide:

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Blanchard needed to have a compelling reason to enter Brown's bedroom with his gun drawn. Yet, in his affidavit, Blanchard never explains why he decided to "force entry into Mr. Brown's bedroom." Blanchard Aff. ¶ 24, ECF No. 26. To be sure, he explains why he decided to kick the door open rather than unlock it, but he does not explain why he decided to enter the bedroom in the first place. He never explains what he

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> A particular concern in this regard is a subject who is apparently trying to commit "suicide by cop" – that is, acting in such a way as to force the police to kill him or her, rather than committing suicide himself or herself. For example, a suicidal man with a gun may ignore orders to drop the weapon, and instead point it at responding officers. Now it is a deadly force situation, and the subject's goal may be to have police respond with deadly force. The person is using the police as the agents of his death rather than pulling the trigger himself.
>
> A specific scenario in this regard is an armed subject who is barricaded in a house and threatening suicide. Such a subject may or may not want the police to kill him. Again, proper response depends on the situation. If the subject has other people with him, perhaps as hostages, then there has to be some response to try to ensure the safety of those other people. In such a case, hostage negotiators will likely be called to try to resolve the situation. If a subject is apparently alone, however, the tactical response decision may be different. Some law enforcement agencies have adopted a "hands off" policy in such cases. They choose not to respond so as to avoid forcing a possible deadly force "suicide by cop" situation. That is, they simply do not provide the subject with the opportunity that he wants for others to kill him.

Crisis Management Guidelines at 66-67.

hoped to accomplish once he was inside. Did he plan on ordering Brown to surrender and hoping that he would comply, or did he have a more reasonable goal in mind? Why didn't Blanchard simply continue to allow Such to monitor Brown through the window and either continue talking to Brown through the door or wait for him to calm down? If Such saw that Brown was using the knife to commit suicide, then at that point Blanchard could have broken into the room and tried to help him. At the time Blanchard decided to enter, however, there was no indication that Brown had the knife hovering over his wrists or was otherwise on the verge of committing suicide. Rather, Such had just informed Blanchard that Brown "was sitting at his computer desk with his back towards the bedroom door, and that he was smoking a cigarette and drinking a beer." Such Aff. ¶ 19. In short, absent some reasonable explanation for Blanchard's entering the bedroom almost immediately after arriving on the scene and creating a situation in which the need to use deadly force would be likely, it is impossible to conclude that Blanchard's conduct during the seizure was reasonable. Accordingly, Blanchard may have violated the Fourth Amendment even if, at the time he fired the shots, Brown was threatening to seriously harm the deputies.[2]

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[2] Of course, "[t]he calculus of reasonableness 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

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Blanchard contends that even if his conduct violated the Fourth Amendment he is entitled to qualified immunity. Qualified immunity "protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal quotation marks omitted). It operates "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier v. Katz*, 533 U.S. 194, 206 (2001). For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (internal quotation marks and citation omitted).

In the present case, I have identified two different factual scenarios under which Blanchard could be deemed to have unreasonably seized Brown: (1) using

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is necessary in a particular situation." *Graham*, 490 U.S. at 396-97. But as noted in the text, the circumstances facing Blanchard did not call for a split-second judgment, as Such was observing Brown and did not see him do anything indicating that immediate entry into the room was required.

deadly force against Brown without probable cause to believe that Brown was threatening the deputies with serious physical harm; and (2) unreasonably creating the encounter that led to Brown's threatening the deputies with serious physical harm. Under the first factual scenario, Blanchard is not entitled to qualified immunity because it is clearly established that an officer may not use deadly force to seize a subject who is not threatening the safety of the officer or anyone else. *Garner*, 471 U.S. at 9-12. Under the second factual scenario, Blanchard is not entitled to qualified immunity because it is clearly established that an officer who shoots a suspect in an effort to protect himself cannot escape liability if the danger he faced was created by his own unreasonable conduct. *Catlin*, 574 F.3d at 369 n.7; *Sledd v. Lindsay*, 102 F.3d at 287-88; *Estate of Starks*, 5 F.3d at 234. Although no case precisely identifies Blanchard's conduct in the second scenario as the kind of "unreasonable conduct" that creates a dangerous situation, I conclude that it would have been obvious to a reasonable officer in Blanchard's position that his or her course of conduct was unlawful despite the absence of a case saying as much. *See Hope*, 536 U.S. at 741 ("officials can still be on notice that their conduct violates established law even in novel factual circumstances"). My conclusion is based on the obvious unreasonableness of Blanchard's conduct: in light of Such's observations of Brown through the bedroom window, there was no reason for Blanchard to immediately enter the room with his gun drawn and create a situation calling for the need to use deadly force. A specific case

identifying this conduct as unreasonable is not needed to give the officer fair notice that the conduct is unlawful.

Accordingly, Blanchard is not entitled to summary judgment.

B. Claim for Failure to Intervene Against Such

An officer who is present and fails to intervene to prevent other law-enforcement officers from infringing the constitutional rights of citizens is liable under § 1983 if that officer had reason to know: (1) that excessive force was being used, (2) that a citizen has been unjustifiably arrested, or (3) that any constitutional violation has been committed by a law enforcement official; and the officer had a realistic opportunity to intervene to prevent the harm from occurring. *Yang v. Hardin*, 37 F.3d 282, 285 (7th Cir. 1994).

In the present case, the plaintiff argues that Such should have intervened to prevent Blanchard from unjustifiably shooting Brown.[3] However, the

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[3] The plaintiff does not argue that Such should have intervened to prevent Blanchard from unreasonably precipitating the need to use deadly force. See Br. in Opp. at 25, ECF No. 28. Moreover, it is hard to see how Such could have intervened at that point, since when Blanchard decided to kick in the door Such was outside the mobile home. Such did not reenter the home until after he saw through the window that the bedroom door was open. Such Aff. ¶¶ 19-20.

plaintiff has not pointed to evidence in the record from which the jury could reasonably conclude that Such knew that Blanchard was about to shoot Brown without probable cause to believe that Brown was threatening the deputies with serious physical harm. The only evidence that plaintiff cites is the deputies' testimony that Such was standing right behind Blanchard when Brown was shot. *See* Br. in Opp. at 25, ECF No. 28. But the most this evidence shows is that had Such known that Blanchard was about to shoot Brown without probable cause to believe that he was threatening the deputies with serious physical harm, he might have been able to prevent him from doing so. It does not suggest that Such in fact knew that Blanchard was about to shoot Brown without probable cause to believe that Brown was threatening the deputies with serious physical harm, and that he passed up an opportunity to prevent Blanchard from shooting. Accordingly, Such is entitled to summary judgment.

C. Claim for Municipal Liability Against Walworth County

Under *Monell v. Department of Social Services*, 436 U.S. 658, 690 (1978), municipalities and other local governmental units are "among those persons to whom § 1983 applies." However, a municipality "cannot be held liable solely because it employs a tortfeasor – or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory." *Id.* at 691. Rather, municipal governments

are liable only when their officers inflict an injury in the execution of the government's policy or custom, "whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." *Id.* at 694.

Under certain circumstances, a municipality's failure to train its officers can amount to a municipal policy and form the basis for liability under § 1983. *City of Canton v. Harris*, 489 U.S. 378, 387 (1989). A municipality will be held liable under a failure-to-train theory only when the inadequacy in training amounts to deliberate indifference to the rights of the individuals with whom the officers come into contact. *Id.* at 388; *Jenkins v. Bartlett*, 487 F.3d 482, 492 (7th Cir. 2007). This may arise in either of two circumstances. First, "a municipality acts with deliberate indifference when, 'in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights,' that the deficiency exhibits deliberate indifference on the part of municipal policymakers." *Jenkins*, 487 F.3d at 492 (quoting *City of Canton*, 489 U.S. at 390). Alternatively, a court may find deliberate indifference "when a repeated pattern of constitutional violations makes 'the need for further training . . . plainly obvious to the city policymakers.'" *Id.* (quoting *City of Canton*, 489 U.S. at 390 n. 10). Besides showing that the failure to train constitutes deliberate indifference, the plaintiff must demonstrate a "causal connection" between the inadequate training

and his or her injury. *See, e.g.*, *Rice ex rel. Rice v. Corr. Med. Servs.*, 675 F.3d 650, 675 (7th Cir. 2012).

In the present case, the question presented in connection with plaintiffs claim against Walworth County is whether the County's failure to provide its deputy sheriffs with training on how to respond to suicide calls amounted to deliberate indifference to the constitutional rights of the individuals with whom the deputies come into contact. The evidence does not indicate that there has been any pattern of constitutional violations involving the rights of suicidal persons in Walworth County, and so the question is whether the need for training on how to respond to a suicide call without committing constitutional violations (including unreasonable seizures) is so obvious that the County's failure to provide such training amounts to deliberate indifference.

A reasonable jury could conclude that the County knew "to a moral certainty" that its sheriff's deputies would be required to respond to suicide calls. *City of Canton*, 489 U.S. at 390 n.10. As the Wisconsin Crisis Management Guidelines explain, "[l]aw enforcement officers often have to deal with suicidal people," including in the context of a call about a person who is armed and threatening suicide. *Crisis Management Guidelines* at 58, ECF No. 29-1. Further, a reasonable jury could conclude that it is obvious that training is needed to ensure that deputies do not unnecessarily precipitate the need to use deadly force during an encounter with a suicidal person. The Crisis Management Guidelines devote an

entire chapter to the topic of how to handle suicidal persons, *id.* at 58-73, and this supports the conclusion that law-enforcement officers need at least *some* training on what to do when responding to a suicide call. Finally, as far as the present record reveals, Walworth County provides its deputies with no training whatsoever on the proper handling of suicide calls. Thus, the jury could reasonably conclude that Walworth County has failed to adequately train its sheriffs deputies on the proper handling of suicidal persons, and that in doing so it was deliberately indifferent to the risk that constitutional violations would result.

The County points out that the Seventh Circuit has held that a failure to provide special training to officers on the proper use of force against "people who appear to be crazy" is not deliberate indifference, at least in the absence of a pattern of constitutional violations that could have been prevented by special training. *See Pena v. Leombruni*, 200 F.3d 1031, 1033-34 (7th Cir. 1999). But in *Pena*, the question was whether special training was needed on the use of force against a crazy person who appeared to be threatening a law-enforcement officer with serious physical harm. The Seventh Circuit held that the municipality's general training on the proper use of force "covered the case of the crazy assailant, giving him all the protection to which constitutional law entitled him." *Id.* at 1033. In the present case, the question is not whether Walworth County should have given its deputies special training on when it

was permissible to use deadly force against a person who appears to be suicidal. It is whether the County should have given its deputies training on how to avoid unreasonably creating the need to use deadly force against a suicidal person in the first place. *Pena* is not instructive on this latter question and thus does not foreclose the plaintiff from pursuing a failure-to-train claim at trial.

Finally, a reasonable jury could find a causal connection between Walworth County's failure to train its deputies on how to respond to suicide calls and the plaintiff's injury. Had Blanchard received some training on strategies for approaching suicidal persons, such as those mentioned in the Crisis Management Guidelines, he might not have unnecessarily rushed into Brown's room with his gun drawn and unreasonably precipitated a deadly confrontation with Brown.

Accordingly, Walworth County is not entitled to summary judgment.

III. CONCLUSION

For the reasons stated, **IT IS ORDERED** that the defendants' motion for summary judgment is **GRANTED IN PART** and **DENIED IN PART**. The motion is granted as to Such and denied as to Blanchard and Walworth County.

Dated at Milwaukee, Wisconsin, this 17th day of July, 2014.

s/ Lynn Adelman
LYNN ADELMAN
District Judge

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Before

KENNETH F. RIPPLE, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

MATTHEW F. KENNELLY, *District Judge**

No. 14-2808

NANCY BROWN,

Plaintiff-Appellee.

v.

WAYNE BLANCHARD and WALWORTH COUNTY, WISCONSIN,

Defendants-Appellants,

Appeal from the United States District Court for the Eastern District of Wisconsin

No. 2:13-cv-00511-LA

Lynn Adelman, *Judge.*

ORDER

(Filed Sep. 22, 2015)

No judge of the court having called for a vote on the Petition For Rehearing or Rehearing En Banc filed by Defendants-Appellants on September 4, 2015, and all of the judges on the original panel having voted to deny the same,

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* The Honorable Matthew F. Kennelly, United States District Court for the Northern District of Illinois, sitting by designation.

IT IS HEREBY ORDERED that the Petition For Rehearing or Rehearing En Banc is DENIED.